Supreme Court, U.S.
FILED

182 D

No. 10- 101068 FEB 22 2011

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ACORN, ACORN INSTITUTE, INC., and MHANY MANAGEMENT, INC., f/k/a/ New York Acorn Housing Company, Inc.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DARIUS CHARNEY
Counsel of Record
JULES LOBEL
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6475
dcharney@ccrjustice.org

Counsel for Petitioners

234801

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Does a congressional ban on federal funds and contracting to one specific, named corporation and all of its subsidiaries, affiliates and undefined "allied corporations" constitute a Bill of Attainder in the circumstances presented by this case?

PARTIES TO THE PROCEEDINGS

Petitioners:

The Association of Community Organizations for Reform Now (ACORN), ACORN Institute, Inc. (AI) and MHANY Management Inc. (MHANY), formerly known as New York Acorn Housing Company, Inc. were the plaintiffs in the district court, appellees in the court of appeals, and are the petitioners in this Court.

Respondents:

The United States of America and the United States officials sued in their official capacity and listed below were the defendants in the district court, appellants in the court of appeals and are the respondents in this Court:

Shaun Donovan, Secretary of the Department of Housing and Urban Development;

Peter Orszag, Director, Office of Management and Budget;

Timothy Geithner, Secretary of the Department of Treasury of the United States;

Lisa P. Jackson, Administrator of the Environmental Protection Agency;

Gary Locke, Secretary of Commerce; and

Robert Gates, Secretary of Defense.

Amici Curiae:

The following *Amici Curiae* presented their views to the Court of Appeals:

Wayne County, Michigan.

Alliance for Justice; Citizen Action of New York; Hakeem Jeffries; Labor Education & Research Project; Legal Aid Society of New York City; Marty Markowitz; Kevin Powell; Western States Center; and Jumaane D. Williams.

United Electrical, Radio & Machine Workers of America; Communications Workers of America; Communications Workers of America Local 1180; Transport Workers Union of America; Transport Workers Union of America of Greater New York; Jobs with Justice; Interfaith Worker Justice; and Maurice & Jane Sugar Law Center for Economic & Social Justice.

Constitutional Law Professors Bruce Ackerman, Erwin Chemerinsky, David D. Cole, Michael C. Dorf, Mark Graber, Seth F. Kreimer, Sanford V. Levinson, Burt Neuborne, and Stephen I. Vladeck.

CORPORATE DISCLOSURE STATEMENT

Petitioners have no parent corporations. No publicly held company owns 10% or more of a corporation's stock the disclosure of which is required under Rule 29.6.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
CORPORATE DISCLOSURE STATEMENT	iv
TABLE OF CONTENTS	v
TABLE OF CITED AUTHORITIES	ix
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
1. The Challenged Statutes and Their Effect on Plaintiffs	4
2. Legislative Background	6
3. Regulatory Scheme	9
PROCEEDINGS BELOW	10
REASONS FOR GRANTING THE PETITION	13

Table of Contents

Page

A. The Decision Below conflicts with Rulings of the D.C. Circuit and this Court in permitting Congress to Impose a Serious Deprivation on a Specific Named Corporation and its allies where the Government has not Asserted Any Non-Punitive Reason to Treat that Corporation Uniquely 14

B. The Court Below's Refusal to Consider Whether Narrower, Less Burdensome Alternatives Existed By Which the Legislature Could have Achieved Its Asserted Objectives Conflicts With Holdings of this Court, the Ninth and D.C. Circuits and A Prior Decision of the Second Circuit..... 24

C. The Lower Court Treated Corporations Differently Than Individuals For Bill of Attainder Purposes in Contrast to This Court's Treatment of Corporations Under the First Amendment and in Conflict With This Court's Decision in *Lovett*. 28

D. The Court of Appeals Set an Impermissibly High Bar to Determine Whether Congress Had Found an Individual Entity Guilty of Misconduct that Conflicts with This Court's Holding in *Lovett* and the D.C. Circuit's Holding in *Foretich*, and is Inconsistent with the History and Purpose of the Bill of Attainder Clause..... 31

CONCLUSION 34

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED AUGUST 13, 2010 ..... 1a

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, FILED MARCH 10, 2010 ..... 33a

APPENDIX C —OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, DECIDED DECEMBER 11, 2009 ..... 78a

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING REHEARING PETITION, FILED NOVEMBER 23, 2010 ..... 106a

APPENDIX E — CONTINUING APPROPRIATIONS RESOLUTION OF 2010, DIVISION B, § 163, PUB. L. NO. 111-68, 123 STAT. 2023, 2053. OCT. 1, 2009..... 108a

APPENDIX F — DEPARTMENT OF THE INTERIOR, ENVIRONMENT, AND RELATED AGENCIES APPROPRIATIONS ACT OF 2010, PUB. L. NO. 111-88..... 110a

Table of Appendices

Page

APPENDIX G — CONSOLIDATED APPROPRIATIONS ACT OF 2010, PUB. L. NO. 111-117 ..... 112a

APPENDIX H—DEPARTMENT OF DEFENSE APPROPRIATIONS ACT OF 2010, PUB. L. NO. 111-118, DIVISION A, § 8123, 123 STAT. 3409, 3458. DEC. 19, 2009 ..... 115a

TABLE OF CITED AUTHORITIES

Page

CASES

ACORN v. United States,
618 F.3d 125 (2d Cir. 2010) 1

Ass'n of Cmty. Orgs. for Reform Now v. United States,
692 F. Supp. 2d 260 (E.D.N.Y. 2010) 1

ACORN v. United States,
662 F. Supp. 2d 285 (E.D.N.Y. 2009) 1

Bd. of County Comm'rs. v. Umbehr,
518 U.S. 668 (1996) 29

BellSouth Corp. v. FCC,
144 F.3d 58 (D.C. Cir. 1998) 12, 19

BellSouth Corp. v. FCC,
162 F.3d 678 (D.C. Cir. 1998) 12, 19, 25

Citizens United v. FEC,
___U.S.__, 130 S. Ct. 876 (2010) 29

Communist Party v. Subversive Activities Control Bd.,
367 U.S. 1 (1961) 21, 27

Consolidated Edison Co. of N.Y., Inc. v. Pataki,
292 F.3d 338 (2d Cir. 2002) 24

Cited Authorities

Page

Cummings v. Missouri,
71 U.S. 277 (1866) 14

Dehainaut v. Pena,
32 F.3d 1066 (7th Cir. 1994) 23

DeVeau v. Braisted,
363 U.S. 144 (1960) 23

Fla. Youth Conservation Corps., Inc. v. Stutler,
2006 U.S. Dist. LEXIS 44732
(N.D. Fla. June 30, 2006) 3

Fleming v. Nestor,
363 U.S. 603 (1960) 21, 23

Foretich v. Morgan,
351 F. 3d 1198 (D.C. Cir. 2003)..... *passim*

Gonzalez v. Freeman,
334 F.2d 570 (D.C. Cir. 1964) 30

Lefkowitz v. Turley,
414 U.S. 70 (1973)..... 29

Navegar, Inc. v. United States,
192 F.3d 1050 (D.C. Cir. 1999) 22

Nixon v. Adm'r of General Servs.,
433 U.S. 425 (U.S. 1977)..... *passim*

Cited Authorities

	Page
O'Hare Truck Service Inc. v. City of Northlake, 518 U.S. 719 (1996)	29
Old Dominion Dairy v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980)	29
Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701 (2007)	2
Plaut v. Spendthrift Farm, 514 U.S. 211 (1995)	23
Reeve Aleutian Airways, Inc. v. United States, 982 F.2d 594 (D.C. Cir. 1993)	30
SBC Comm'n. v. FCC, 154 F.3d 226 (5th Cir. 1998)	19
SeaRiver Mar. Fin. v. Mineta, 309 F.3d 662 (9th Cir. 2002)	22, 24
Selective Serv. Sys. v. Minn. Pub. Interest Research Group, 468 U.S. 841 (1984)	16, 23, 27
Sloan v. Dep't of Housing and Urban Dev., 231 F.3d 10 (D.C. Cir. 2000)	30
Transco SEC v. Freeman, 639 F.2d 318 (6th Cir. 1981)	30

Page

Trifax Corp. v. District of Columbia,
314 F.3d 641 (D.C. Cir. 2003) 30

United States v. Brown,
381 U.S. 437 (U.S. 1965) ..... *passim*

United States v. Lovett,
328 U.S. 303 (U.S. 1946) ..... *passim*

STATUTES

28 U.S.C. § 1254 1

Continuing Appropriations Resolution of 2010,
Pub. L. No. 111-68, 123 Stat. 2023 (2009) ... 1, 4, 5, 7

Consolidated Appropriations Act of 2010,
Pub. L. No. 111-117, 123 Stat. 3034, (2009) .. 1, 4, 6, 9

Department of Defense Appropriations Act of 2010,
Pub. L. No. 111-118, 123 Stat. 3409 (2009) 1, 26

Department of the Interior, Environment, and
Related Agencies Appropriations Act of 2010,
Pub. L. No. 111-88, 123 Stat. 2904 1

Supplemental Appropriations Act of 2010,
Pub. L. No. 111-32, § 1102 (2009) 26

Cited Authorities

Page

Transportation, Housing and Urban Development, and Related Agencies Appropriations Act of 2011, H.R. 5850, 111th Cong. § 416 (2010) 5

UNITED STATES CONSTITUTION

U.S. Const. Article I, Section 9, cl 3 1

U.S. Const. First Amendment..... 10

U.S. Const. Fifth Amendment..... 10, 28

CONGRESSIONAL RECORD

155 Cong. Rec. S. 9308 (daily ed. Sep. 14, 2009) ..... *passim*

155 Cong. Rec. H. 9555 (daily ed. Sep. 16, 2009) .. 9

155 Cong. Rec. S. 9499 (daily ed. Sep. 17, 2009).... 7, 32

155 Cong. Rec. S. 9554 (daily ed. Sep. 17, 2009).... 7

155 Cong. Rec. H. 9675 (daily ed. Sep. 18, 2009)... 7

155 Cong. Rec. S. 9683 (daily ed. Sep. 22, 2009) ... 7, 32

155 Cong. Rec. H. 9784 (daily ed. Sep. 22, 2009)... 8

155 Cong. Rec. H. 9946 (daily ed. Sep. 24, 2009)... 8, 9

Page

155 Cong. Rec. H. 10129 (daily ed. Sep. 30, 2009) . . 8

155 Cong. Rec. S. 10181 (daily ed. Oct. 7, 2009) 7, 32

155 Cong. Rec. H. 11080 (daily ed. Oct. 7, 2009) . . . 8

155 Cong. Rec. S. 11313 (daily ed. Nov. 10, 2009). . . 7, 32

RULES AND REGULATIONS

2 C.F.R. § 180 9

2 C.F.R. § 180.605 26

2 C.F.R. § 180.610 10

2 C.F.R. § 180.715. 10

2 C.F.R. § 180.720 10

2 C.F.R. § 180.805 10

2 C.F.R. § 180.825 10

Exec. Order 12,549, 3 C.F.R. 6370 (1986) 10

Page

OTHER AUTHORITIES

The Act for the Attainder of Thomas Fitzgerald, Earl of Kildare 1534, 26 Hen. 8, c. 6 (priv.) 21

AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 124 (Random House) (2005) 15

American Bar Association, *Resolution 116*, REPORT TO THE HOUSE OF DELEGATES (2010) 4

THE FEDERALIST No. 44, at 218 (James Madison) (Terrence Ball ed., 2003) 15

2 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 270 (4th ed. 1833) 19

Kate M. Manuel, *Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments*, CONG. RES. SERV., Nov. 19, 2008 .. 17

ROBERT JACKSON, MEMORANDUM CONCERNING H.R. 9766 ENTITLED "AN ACT TO DIRECT THE DEPORTATION OF HARRY RENTON BRIDGES," *reprinted in* S. REP. NO. 76-2031, pt. 1 (1940) ... 23

Scott Harshbager, *An Independent Governance Assessment of ACORN: A Path to Meaningful Reform* (Dec. 7, 2009) 34

Cited Authorities

Page

The Second Circuit Holds That Law Barring ACORN From Receiving Federal Funds is Not a Bill of Attainder, 124 HARV. L. REV. 859 (2011) 17, 32

STAFF OF H. COMM. ON OVERSIGHT AND GOVERNMENT REFORM, 111TH CONG., IS ACORN INTENTIONALLY STRUCTURED AS A CRIMINAL ENTERPRISE? (Comm. Print 2009) 6, 32

3 Thomas Babington Macauley, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND (London 1855) 22

U.S. GEN. ACCT. OFFICE, PRELIMINARY OBSERVATIONS ON FUNDING, OVERSIGHT, AND INVESTIGATIONS AND PROSECUTIONS OF ACORN OR POTENTIALLY RELATED ORGANIZATIONS (June 14, 2010) 25

U.S. GEN. ACCT. OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, GOVERNMENT CONTRACTING ADJUDICATED VIOLATIONS OF CERTAIN LAWS BY FEDERAL CONTRACTORS (2002) 17

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. A, 1a-32a) is reported at 618 F.3d. 125, and the two opinions of the district court (App. B, 33a-77a; App. C, 78a-105a) are reported at 692 F. Supp 2d 260 and 662 F. Supp 2d 285.

JURISDICTION

The court of appeals issued its opinion vacating the district court judgment on August 13, 2010. The court of appeals denied petitioners timely motion for a rehearing *en banc* on November 23, 2010. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Bill of Attainder Clause, Article I, Section 9, which provides that "No Bill of Attainder ... shall be passed." Various Congressional appropriations statutes are challenged as Bills of Attainder: Continuing Appropriations Resolution of 2010, Pub. L. No. 111-68, § 163, 123 Stat. 2023, 2053 (2009) (App. E, 108a-109a); Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, § 418, 123 Stat. 3034, 3112 (2009); *id.* at §§ 534-535, 123 Stat. 3034, 3157-8; *id.* at § 511, 123 Stat. 3034, 3311 (App. G, 112a-114a); Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, § 8123, 123 Stat. 3409, 3458 (2009) (App. H, 115a); Department of the Interior, Environment, and Related Agencies Appropriations Act of 2010, Pub. L. No. 111-88, § 427, 123 Stat. 2904, 2962 (App. F, 110a-111a).

STATEMENT OF THE CASE

ACORN and two separate corporations, Acorn Institute (AI) and MHANY, which have been considered by the government to be "allied organizations" of ACORN[1], challenge unprecedented congressional appropriations statutes banning them from receiving federal contracts or funds.[2] Never before in American history has Congress

---

1. Defendants consider plaintiff AI to be an "allied organization" of ACORN and until shortly after the appellate oral argument, also treated MHANY as an "allied organization" and barred contracts and other funding to it. After appellate oral argument, the Department of Housing and Urban Development (HUD) determined that it would no longer consider MHANY to be an allied organization. However, other Federal and New York City (NYC) agencies, particularly the NYC Housing Preservation and Development, still treat MHANY as an allied organization, thus preventing MHANY from accessing federal funds or grants from those agencies. In addition various private entities continue to be reluctant to contract with MHANY because of the continuing taint of its having been barred from Federal funds. Moreover, HUD's voluntarily-changed position does not moot MHANY's claims against HUD because HUD's new position could easily be reversed if the statutory bar is not repealed or enjoined. *Parents Involved in Community Schools v. Seattle School Dist. No 1*, 551 U.S. 701, 719 (2007).

2. In substantial part due to the Congressional ban imposed here and its effect not only on federal contracts and funding, but also, as the district court found, on private and state funding, ACORN and ACORN Institute have filed for bankruptcy under Chapter 7, and bankruptcy proceedings are now pending before Judge Elizabeth S. Stong in the Eastern District of New York. The Bankruptcy Trustee, David J. Doyoga Esq. has authorized counsel to file this petition on behalf of ACORN and ACORN Institute as special counsel to the Trustee, *nunc pro tunc*, and an application for an order to that effect has been filed with the Bankruptcy Court.

barred a specific, named corporation from being awarded federal funds or contracts. Indeed, counsel has found only one instance in which a State legislature denied a specific corporation the opportunity to obtain state contracts, and a Federal District Court enjoined that law as an unconstitutional Bill of Attainder. *Fla. Youth Conservation Corps., Inc. v. Stutler*, 2006 U.S. Dist. LEXIS 44732, at *2 (N.D. Fla. June 30, 2006).

These statutes are not only unprecedented, but also unusually broad in scope. In contrast to the regulatory regime that governs federal contractors, these statutes automatically bar not only the corporation accused of wrongdoing, but any of its subsidiaries, affiliates and undefined "allied organizations." The bar resulted in the suspension and effective termination of plaintiffs' existing federal contracts. The challenged statutes also circumvent a well established administrative process which regulates the debarment and suspension of corporations from federal contracting or grants, but accords the affected corporations due process protections.

The decision below constitutes a dangerous precedent that would permit Congress or State legislators to single out unpopular corporations or organizations for a ban on contracts or funding based on public clamor against that entity for alleged wrongdoing. The historical, core separation of powers function of the Bill of Attainder Clauses protects against legislative determinations that a specific named individual or entity is guilty of misconduct and deserves to be deprived of rights or privileges others enjoy. The danger posed by legislative debarment or suspension of individual corporations, and the potential undermining of the current non-punitive administrative framework for debarment, led the

American Bar Association to recently adopt a resolution opposing "legislation that would mandate suspension or debarment of a single entity or class without reliance on the existing and carefully developed regulatory framework for suspension and debarment determinations." A.B.A., *Resolution 116*, REPORT TO THE HOUSE OF DELEGATES (2010), *available at* http://www2.americanbar.org/SiteCollectionDocuments/116.pdf.

This case raises the important question of what standard of review courts should utilize in analyzing Bill of Attainder claims that Congress has improperly imposed a serious burden on a specified individual or group.

1. The Challenged Statutes and Their Effect on Plaintiffs

Section 163 of the Continuing Appropriation Resolution for Fiscal Year 2010, effective October 1, 2009, extended on October 31, 2009, and expired December 18, 2009, provided that, "*[n]one* of the funds made available by this joint resolution or *any prior Act* may be provided to the Association of Community Organization for Reform Now (ACORN) or any of its affiliates, subsidiaries, or *allied* organizations." App. E, 108a; App. F, 111a (emphasis added).

On December 16, 2009, President Obama signed the 2010 Consolidated Appropriations Act which similarly barred funding to ACORN and certain affiliates for all of the many agencies covered by the Act.[3] App. G, 112a.

---

3. The Consolidated Act consists of six subdivisions, three of which contain Defund ACORN language. Section 511 of Division E of the Act states "that none of the funds made

The bar contained in the 2010 Appropriations Act has been continued in the 2011 Continuing Resolution and is contained in the 2011 Appropriation Acts yet to be adopted.[4] The ban thus continues to date.

The district court found, and it is undisputed, that the Congressional bar has resulted in: a) the suspension and de facto termination of plaintiffs' existing federal contracts, subcontracts and grant agreements; b) the rescission of grants previously awarded where a signed contract had not been entered into; c) the denial to plaintiffs of the opportunity to apply for and receive new grants and contracts; d) the deprivation of the opportunity to apply for contracts with state or private entities involving federal funds. App. C, 101a-103a, 82a-83a; App. B 38a, 72a-73a. The district court also determined that the "record establishes" that the Congressional ban "has also affected ACORN's ability to obtain funding from non-governmental entities fearful of being tainted—because of the legislation—as an affiliate of ACORN." App. B, 68a-9.

---

available in this division or *any other division* in this Act may be distributed to the Association of Community Organizations for Reform Now (ACORN) or its subsidiaries," and thus covers the entire consolidated appropriations act. App. G, 114a. Section 418 of Division A of the Act, which provides appropriations for the Transportation and Housing and Urban Development (HUD) agencies, the largest source of federal funding for plaintiffs, contains identical language to the Continuing Resolution. App. G, 112a.

4. Transportation, Housing and Urban Development, and Related Agencies Appropriations Act of 2011, H.R. 5850, 111th Cong. § 416 (2010).

2. Legislative Background

In July, 2009, Representative Darrell Issa of California, then the ranking Republican member of the House Committee on Oversight and Governmental Reform, released an 88-page staff report entitled, *Is ACORN Intentionally Structured as a Criminal Enterprise?* [hereinafter *Issa Report*].[5] The *Issa Report* concluded that ACORN and numerous organizations associated or allied with it constituted "a criminal enterprise" that had "repeatedly and deliberately engaged in systemic fraud," is "a shell game," and had "committed a conspiracy to defraud the United States by using taxpayer funds for partisan political activities." *Id.* at 3-4. The Report also accused ACORN of improperly aiding Democratic candidates. *Id.* at 5, 7. The Report called for "piercing the corporate veil" "to remove the distinction between ACORN and its affiliates." *Id.* at 13. It also appended a list of 361 organizations including trade unions, public radio stations, political parties and grassroots community organizations that it asserted composed the ACORN "council." *Id.* at 74-81.

The Executive Summary of the *Issa Report* was read into the Congressional Record by Senator Mike Johanns (R-NE) when he introduced the amendment that eventually became Section 418 of Division A of the Consolidated Appropriations Act of 2010 on September 14, 2009.[6]

---

5. *See* STAFF OF H. COMM. ON OVERSIGHT AND GOVERNMENT REFORM, 111TH CONG., IS ACORN INTENTIONALLY STRUCTURED AS A CRIMINAL ENTERPRISE? (Comm. Print 2009), *available at* http://republicans.oversight.house.gov/images/stories/Reports/20091118_ACORNREPORT.pdf.

6. 155 CONG. REC. S9308, 9309-10 (daily ed. Sep. 14, 2009).

Senator Johanns, who also introduced the amendments that became the other four FY 2010 appropriations statutes challenged here,[7] described ACORN as "an organization that is besieged by corruption, by fraud, and by illegal activities, all committed on the taxpayers' dime," and declared that "somebody has to go after ACORN," and that "that 'somebody' is each and every member of the Senate."[8]

On September 17, 2009, Congressman Issa and Senator Johanns introduced legislation to permanently bar ACORN and any ACORN affiliates from receiving any federal funds.[9] Issa stated that his purpose was "to put an immediate stop to federal funding to this crooked bunch."[10] The House passed that legislation the same day with no debate by vote of 345-75.[11]

These Congressional actions introducing both permanent and FY 2010 appropriation bans were spurred by the release of videotapes purporting to show ACORN employees engaged in misconduct, videos now shown to have been heavily edited for partisan purposes. During the debate on the Continuing Resolution and the

---

7. *See* 155 CONG. REC. S9499, 9517-9518 (daily ed. Sep. 17, 2009); 155 CONG. REC. S9683, 9685 (daily ed. Sep. 22, 2009); 155 CONG. REC. S10181, 10207 (daily ed. Oct. 7, 2009); 155 CONG. REC. S11313 (daily ed. Nov. 10, 2009).

8. 155 Cong. Rec. S9308, 9310, 9317.

9. 155 CONG. REC. S9554, 9555 (daily ed. Sep. 17, 2009); 155 CONG. REC. H9675, 9699 (daily ed. Sep. 18, 2009).

10. 155 Cong. Rec. H9675, at 9700 (statement of Representative Issa).

11. *Id.* at 9700-9701.

challenged FY 2010 Appropriations Acts, *every* member of Congress who spoke in favor of these provisions accused ACORN of serious criminal conduct or attacked it for impermissable partisan political activities. ACORN was excoriated for: "their repeated assistance for housing, tax and mortgage fraud;"[12] helping "facilitate child prostitution," maintaining "a culture of ... child prostitution," "involvement" in "corrupting our election process," and "a practice of shaking down lenders" equivalent to the "Mafia";[13] engaging in "racketeering enterprises" and "committing investment fraud";[14] "furthering the trafficking of illegal aliens, minor girls into childhood prostitution and child abuse";[15] being in the "criminal hall of fame";[16] being associated with "voter fraud";[17] being "a parasitic organization,"[18] and being "a reprehensible enterprise" engaged in "outrageous and

---

12. 155 CONG. REC. S9308, 9314 (daily ed. Sept. 14, 2009) (statement of Senator Bond).

13. 155 CONG. REC. H9946, 9948-9950 (daily ed. Sep. 24, 2009) (statement of Representative King).

14. 155 CONG. REC. H9784, 9785-88 (daily ed. Sep. 22, 2009) (statement of Representative Carter).

15. 155 CONG. REC. H9946, 9952 (daily ed. Sep. 24, 2009) (statement of Representative Bachman).

16. 155 CONG. REC. H10129 (daily ed. Sep. 30, 2009) (statement of Representative Franks).

17. 155 CONG. REC. H11080 (daily ed. Oct. 7, 2009) (statement of Representative Inglis).

18. 155 CONG. REC. H9784, 9785, 9787 (daily ed. Sep. 22, 2009) (Statement of Representative Gohmert).

illegal activity."[19] ACORN was also attacked as "a get-out the vote organization for Democrats,"[20] and a "partisan political organization."[21] No opportunity was afforded ACORN by Congress to respond to any of these charges.

The FY 2010 Consolidated Appropriations Act also contained a provision requiring the United States Government Accountability Office (GAO)[22] to investigate ACORN's activities and submit a report within 180 days. App. G, 113a (§ 535). The legislative debarment of plaintiffs, however, is not tied to the results of the investigation and continued for the entire year irrespective of the conclusions the GAO might reach. App. B, 57a.

3. Regulatory Scheme

The Code of Federal Regulations contains extensive regulations providing for government-wide debarment and immediate suspension of federal grantees or contractors in certain circumstances.[23] In suspending or debarring organizations, the Federal Regulations require that the affected entity receive due process, including written

---

19. 155 CONG. REC. H9555 (daily ed. Sep. 16, 2009) (statement of Representative Bilirakis).

20. 155 CONG. REC. H9946, at 9949 (statement of Representative King).

21. 155 CONG. REC. S9308, 9314 (daily ed. Sep. 14, 2009) (statement of Senator Hatch).

22. The statute refers specifically to the "Comptroller General of the United States," who is the official head of the U.S. Government Accountability Office. App. G, 113a.

23. *See* 2 C.F.R. § 180

notice of the reasons for the agency action and a reasonable opportunity to contest the action.[24]

PROCEEDINGS BELOW

The plaintiffs brought this action challenging Section 163 of the Continuing Resolution as a Bill of Attainder and a violation of the Fifth Amendment's Due Process Clause and the First Amendment. On December 11, 2009, the district court granted the plaintiffs motion for a preliminary injunction, holding that the plaintiffs had shown a likelihood of success on the merits of their Bill of Attainder claim. App. C, 78a. Later in December, President Obama signed into law FY 2010 Appropriations acts containing language similar to the Continuing Resolution ban on ACORN funding. The plaintiffs then filed a second amended complaint challenging the new FY 2010 appropriation laws, and moved for a declaratory judgment and a preliminary and permanent injunction.

On March 10, 2010, the district court held the challenged statutes to be Bills of Attainder. The court first found that the deprivation of existing contracts and the denial of the opportunity to be awarded future contracts or funds fit comfortably within the meaning of punishment as set forth in *United States v. Lovett*, 328 U.S. 303 (1946), where this Court declared a statute permanently barring appropriations to pay the salaries of specific, named government employees accused of being subversives to be an unconstitutional Bill of Attainder. App. B, 52a. The court also concluded that from a functional perspective the

---

24. *See id.* §§ 180.610, 180.715, 180.720, 180.805, 180.825; Exec. Order 12,549, 3 C.F.R. 6370 (1986).

statutes imposed punishment, rejecting the government's argument that a formal finding of guilt was required, and holding that the "nature of the bar and the context within which it occurred make it unmistakable that Congress determined ACORN's guilt before defunding it." *Id.* at 53a. The court held that the fact that plaintiffs had no right to government contracts was not dispositive since the *Lovett* court did not rely on any right to government employment. *Id.* at 49a. Furthermore, that the ban was not necessarily permanent did not defeat plaintiffs' claims, since punishment need not be permanent. *Id.* at 54a-56a.

The district court rejected the government's argument that Congress could rely on a variety of investigations to impose a funding ban on a specific named organization, holding that a legislative determination of an individual entity's wrongdoing based on investigative reports would constitute the substitution of legislative for judicial determination of guilt which is the hallmark of a bill of attainder. App. B, 56a-57a. The court also found that "the unavailability of any means for ACORN to overcome the funding ban if the [GAO] investigation report is favorable underscores the lack of a connection between the burdens of the statute and Congress's purpose in enacting it." *Id.* at 58a.

Finally, the district court recognized that while not every statute directed at a single individual or entity constitutes a bill of attainder, those judicial decisions such as *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), holding that Congress had created a "legitimate class of one" were premised on the government's articulation of a non-punitive rationale to treat the individual or organization *uniquely*. By contrast,

in this case the "government has offered no similarly unique reason [as in *Nixon* and the *Bell Operating Cases*] to treat ACORN differently from other contractors accused of serious misconduct and to bar ACORN from federal funding without either a judicial trial or the administrative process applicable to all other government contractors." App. B, 60a-61a.

The court of appeals reversed. The court rejected the plaintiffs' argument that corporate suspension and debarment from federal contracts should be treated similarly to employees' debarment from government employment, arguing that unlike penalties levied against individuals, a temporary one year bar on federal contracting to a corporation may be "more an inconvenience than punishment." App. A, 20a. The court also held that "plaintiffs were not prohibited from any activities; they are only prohibited from receiving federal funds to continue their activities," ignoring the fact that plaintiffs were precluded from completing ongoing, existing contracts and barred from obtaining new federal contracts. *Id.* at 21a.

The court of appeals also rejected the district court's analysis that a statute targeting a specific entity required the government to articulate some non-punitive rationale to treat the entity uniquely. Instead, the court determined that Congress must have the authority to suspend federal funds to an organization that has "admitted to significant mismanagement," and need not explain why Congress targeted this organization and not the many others who have either admitted to or been convicted of mismanagement or more serious misconduct. *Id.* at 21a, 25a, 27a. The court cited to nothing in the record

indicating that ACORN admitted to being afflicted with significant organizational mismanagement in September 2009. Indeed, as the district court noted, ACORN has throughout this litigation contested the allegations against it. App. B, 36a; App. C, 79a. Finally, the court distinguished *Lovett* from this case, holding that here, unlike in *Lovett*, "there is no congressional *finding* of guilt," implicitly rejecting the district court's holding that the nature and structure of the ban implied a Congressional finding of guilt. App. A, 31a.

REASONS FOR GRANTING THE PETITION

Review is warranted for four reasons. First, the Second Circuit's failure to require the government to articulate a non-punitive reason to single out a specific organization for a significant deprivation conflicts with rulings in the D.C. Circuit and this Court. Second, the court of appeals' refusal to consider whether less burdensome alternatives existed conflicts with decisions of the Ninth Circuit and D.C. Circuit, a prior holding of another Second Circuit panel, and decisions of this Court. Review is thus warranted for the first two reasons in order for this Court to resolve conflicts among the circuits as to the proper standard of review for Bill of Attainder claims involving Congressional statutes that single out a specific individual or group for a significant deprivation. Third, the court of appeals differing treatment of corporations and individuals for purposes of the Bill of Attainder Clause is at odds with this Court's first amendment jurisprudence, results in a conflict with this Court's decision in *Lovett*, and poses a serious danger to the administrative and regulatory regime that governs federal contractors. Finally, the court of appeals refusal

to find that Congress determined ACORN's guilt in enacting these statutes conflicts with the *Lovett* decision and decisions of this Court and other courts holding that a legislative determination of guilt need not be formally expressed by Congress.

A. The Decision Below conflicts with Rulings of the D.C. Circuit and this Court in permitting Congress to Impose a Serious Deprivation on a Specific Named Corporation and its allies where the Government has not Asserted Any Non-Punitive Reason to Treat that Corporation Uniquely

The statutes challenged here are not only unprecedented in debarring a specific federal contractor, but represent one of the exceedingly rare instances in our history where Congress has sought to impose a significant *deprivation* on a specific, named individual or organization. The undoubted reason for the scarcity of Congressional legislation of this type is the recognition by all three branches of government that the separation of powers principles underlying the Bill of Attainder Clause deny Congress the power to determine that a specific individual or organization is guilty of misconduct and deprive that person of "any rights, civil or political" without the due process protections afforded by a judicial trial, or an administrative proceeding. *Cummings v. Missouri*, 71 U.S. 277, 320, 322 (1866).

It has long been understood that the Bill of Attainder Clause serves a vital separation of powers function, reflecting "the Framer's belief that the legislative branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness,

of, and levying appropriate punishment upon, *specific persons." United States v. Brown*, 381 U.S. 437, 445 (1965) (emphasis added); *see also Lovett*, 328 U.S. at 317 (founders understood the danger inherent in special legislative acts which take away the life, liberty or property of particular named persons). Both Madison and Hamilton viewed the Clause as an important "constitutional bulwark in favor of personal security and private rights," and a vital barrier ensuring that the legislature would not perform the functions of the judiciary. THE FEDERALIST No. 44, at 218 (James Madison) (Terrence Ball ed., 2003); *Brown*, 381 U.S. at 444 (quoting Alexander Hamilton). The Constitution's twin Bill of Attainder Clauses "have deep roots in rule-of-law ideology." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 124 (Random House) (2005). Thus, the question in Bill of Attainder cases imposing deprivations on specific individuals or entities is not whether the legislature had a reasonable basis for finding that a particular entity committed misconduct, but rather whether the legislature is entitled to make that judgment.

The importance and well recognized constitutional protection against legislative targeting of specific individuals or groups is reflected in the fact that to counsel's knowledge, there is only one other reported case in the past decade where Congress sought to impose a significant burden on a named individual, and that statute was declared an unconstitutional Bill of Attainder by the D.C. Circuit in *Foretich v. Morgan*, 351 F.3d 1198 (D.C. Cir. 2003). The *Foretich* Court employed a markedly different and inconsistent analysis, approach and test than that utilized by the Second Circuit here.

In *Foretich*, the court decided that a statute denying Dr. Foretich visitation rights with his minor daughter without her consent constituted a Bill of Attainder, in large part because the Government "offers no answer to the question of why the ... standard of the Act was not made available in other child custody cases." *Id.* at 1223. The D.C. Circuit held that the "narrow application of a statute to a specific person or class of persons raises suspicion, because the Bill of Attainder Clause is principally concerned with 'the *singling out*' of an individual for legislatively prescribed punishment." *Id.* at 1224 (quoting *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 847 (1984) (emphasis in original)). The D.C. Circuit recognized that Congress could in certain circumstances legislate against particular individuals, *Id.* at 1217, 1224, but held that "the selectivity or scope of a statute may indicate punitiveness where *the differential treatment* of the affected party or parties cannot be explained 'without resort to inferences of punitive purpose.'" *Foretich*, 351 F.3d at 1222 (internal quotations omitted) (emphasis added). The Court stated that in "this case, it is the Act's specificity that renders the asserted non-punitive purposes suspect" because the government had proffered no non-punitive reason to treat Dr. Foretich uniquely. *Id.* at 1224.

The Second Circuit's decision here, in contrast to the D.C. Circuit's *Foretich* decision and that of the district court, did not consider Congressional legislation imposing a serious burden on a specific named entity suspect, and never questioned whether the government had articulated a non-punitive reason to distinguish between ACORN and the many other federal contractors who are accused of, admit to, or convicted of misconduct, mismanagement,

fraud or criminal activities and have never been suspended or debarred by Congressional legislation.[25] Rather, the court reasoned that a reasonable reason to suspend ACORN would suffice, even though the reasonable reason asserted – ACORN's purportedly admitted serious mismanagement – itself constituted a Congressional determination that ACORN was guilty of misconduct, and did not support Congress' determination to subject ACORN to *unique* treatment. The Circuit's analysis would allow Congress to single out particular corporations, academic researchers, government employees, banks or other institutions for significant deprivations and defeats the important protection afforded by the Bill of Attainder Clause. As one recent commentator has observed, "the deferential stance that the court [below] took toward Congress on the question of ACORN's culpability undermined the very purpose of the Bill of Attainder Clause." *The Second Circuit Holds That Law Barring ACORN From Receiving Federal Funds is Not a Bill of Attainder*, 124 HARV. L. REV. 859, 864 (2011).

The court of appeals reasoning is also inconsistent with the only three cases in the past 50 years that have upheld statutes imposing a significant burden on specific,

---

25. Hundreds if not thousands of government contractors not only have "management" problems but have received contract awards despite having engaged in serious proven or admitted misconduct. Kate M. Manuel, *Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments*, CONG. RES. SERV., Nov. 19, 2008, at 12-13; U.S. GEN. ACCT. OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, GOVERNMENT CONTRACTING ADJUDICATED VIOLATIONS OF CERTAIN LAWS BY FEDERAL CONTRACTORS 5 (2002).

named individuals or organizations. In each of those cases, the court articulated a non-punitive reason that expressed no implied judgment of misconduct or guilt on the named entity and explained why Congress' could legitimately impose a *unique* burden upon the specific individual or corporation.

This Court, in *Nixon*, held that Congress could legitimately create a class of one because the statute's singling out of Nixon was "easily explained by the fact that at the time of the Act's passage, only his materials demanded immediate attention." 433 U.S. at 472. "Congress had reason for concern solely with the preservation of [Nixon's] materials, because he alone had entered into a depository agreement, the Nixon-Sampson agreement, which by its terms called for the destruction of the materials." *Id.* It was that unique depository agreement that made Nixon a "*legitimate* class of one, and this provides the *basis* for Congress' decision to proceed with dispatch with respect to his materials." *Id.* (emphasis added). The *Nixon* Court determined that the statute involved there did not "rest upon a congressional determination of guilt and a desire to punish him," because Congress wanted to preserve Nixon's documents and negate the unique Nixon-Sampson agreement permitting their destruction, and not because Congress believed him guilty of past wrongdoing. *Id.* at 475-484.

So too, the D.C. Circuit and the Fifth Circuit followed *Nixon* in upholding a statute in which Congress specifically singled out the Bell Operating Companies for differing treatment from other telephone companies because of the "unique infrastructure controlled by the BOCS" which permitted them, and only them, to exercise monopoly

power. *See, e.g., BellSouth Corp. v. FCC*, 162 F.3d 678, 689–90 (D.C. Cir. 1998); *SBC Commc'n. v. FCC*, 154 F.3d 226, 243 (5th Cir. 1998). Because of their unique position, "the differential treatment of the BOCs and non BOCs, is neither suggestive of punitive purpose nor particularly suspicious." *BellSouth Corp.*, 162 F.3d at 690 (quoting *BellSouth Corp. v. FCC*, 144 F.3d 58, 67 (D.C. Cir. 1998)).

The court of appeals failure to determine whether the "class of one" created here was "legitimate" because Congress had some reason to treat ACORN and its allies uniquely eviscerates the Bill of Attainder Clause's important separation of powers function, and has the effect of improperly merging Attainder jurisprudence with that of the Equal Protection Clause. Unlike the Equal Protection Clause, the Attainder Clause is not primarily concerned with over-inclusive or under-inclusive *classifications*, but rather with the legislature's improper determination of *individual* guilt and deprivation of *specific* individuals or organizations rights. *Brown*, 381 U.S. at 447 (Clause must "be read in light of the evil the framers had sought to bar: Legislative punishment of any form or severity, of specially designated persons or groups."); *Nixon*, 433 U.S. at 480 (Bill of Attainder Clause concerned with "the fear that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient to assume the mantle of judge—or, worse still, lynch mob."); 2 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 270 (4th ed. 1833) (when the "legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial," it exercises "what may properly be deemed an irresponsible despotic discretion....").

Therefore, the test for whether a law singling out a specific group or individual constitutes "punishment" cannot be the general "rational basis" equal protection test questioning whether the legislature can proffer any legitimate non-punitive purpose justifying the law. Because the historic function of the Attainder Clause is to prevent the legislature from singling out specific individuals, a law targeting a specific individual or firm for a serious deprivation is presumptively suspicious, and to avoid the conclusion that it imposes "punishment," the legislature must show some non-punitive reason that would not merely justify the regulation of a class of individuals but explain why the affected entity is in a unique situation that demands special treatment irrespective of whether it is guilty of misconduct. That the legislature has the legitimate power to bar subversive individuals from government positions during war, or individuals likely to instigate political strikes from union positions, or child abusers from having custody of their children, did not save statutes specifically targeting named individuals or groups for such deprivations from being Bills of Attainder.

The court of appeals decision attempted to avoid this Court's and the D.C. Circuit's Bill of Attainder jurisprudence by arguing that because the challenged statutes not only debarred ACORN but also "hundreds of unnamed 'allied' and 'affiliate' organizations," they "are similar to a rule of general applicability and are less likely to have a punitive purpose." App. A, 26a.

The court's view that the challenged statutes are akin to a "rule of general applicability" conflicts with this Court's and the historical definition of the term. This Court has defined a "generally applicable rule" for Bill of Attainder purposes as one which defines the proscribed

group or individual by whether the entity "commits certain acts or possesses certain characteristics." *Brown*, 381 U.S. at 450; *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 84–85 (1961) (distinguishing between "restricting a group or individual by name" versus regulating "not enumerated organizations but *designated activities*"); *Fleming v. Nestor*, 363 U.S. 603, 614 (1960) (distinguishing statutes regulating a category of activities or a status from those "where the statute in question is aimed at the person or class of persons disqualified").[26] As Chief Justice Warren put it in *United States v. Brown*, it is the "command—of the Bill of Attainder Clause—that a legislature can provide that persons containing certain characteristics must abstain from certain activities, but must leave to other tribunals the task of deciding who possesses those characteristics. ..." *Brown*, 381 U.S. at 455 n.29.

Indeed, in viewing these statutes as imposing a "rule of general applicability," the Circuit ignored not only this Court's holdings, but the historic practice of Bills of Attainders and of Pains and Penalties, which not only imposed penalties on the targeted individual, but often "condemned a named person and his adherents." *Lovett*, 328 U.S. at 327 (Frankfurter, J., concurring).[27] Thus, the

---

26. The Circuit's citation of *Fleming* underscores its error: In *Fleming*, Congress barred "the great majority of those deported" for a variety of reasons from receiving Social Security benefits. This Court found that Congress was concerned with the "fact of deportation... a far cry from situations ... where legislation was on its face aimed at particular individuals." *Fleming*, 363 U.S. at 619.

27. *See, e.g., Act for the Attainder of Thomas Fitzgerald, Earl of Kildare*, 1534, 26 Hen. 8, c. 6 (priv.) (not only punishing the Earl, but also "all suche persons whiche be or hereafter have ben conffortours abbetours partakers confederates or adherents unto

Brown Court rejected the Solicitor General's argument that the statute was not a traditional Bill of Attainder because it did not single out named individuals, but rather applied to thousands of unnamed individuals associated with the Communist Party. *Brown*, 381 U.S. at 441–42, 461.

The statutes challenged here do not set forth a "rule of general applicability" because they bar federal funds to organizations based not on their misconduct or any other general characteristics or activity, but solely because of their undefined association with a specific named organization. They target the organization and its associates, not the characteristics the organization is alleged to posses or the activity it is alleged to have engaged in.

This case is therefore different than Bill of Attainder cases challenging Congressional legislation against a *class* of individuals or organizations narrowly defined by a set of characteristics involving their activities or status, and not targeting enumerated individuals or organizations.[28]

---

the said Erie"); *see* 3 Lord Macauley, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND (London 1855) (Bill of Attainder listing several thousand people considered enemies of James); *Brown*, 381 U.S. at 441-42 (citing Bills of pains and penalties which excluded sons of a designated party from sitting in Parliament).

28. Similarly, *Navegar v. U.S.*, 192 F. 3d 1050 (D.C. Cir. 1999) involved a statute which did not specify any person or corporation for specific harm, but rather barred categories of weapons. *Id.* at 1067 (statute "regulate(s) an entire class of weapons"). The restriction challenged in *SeaRiver Maritime Financial Holdings v. Mineta*, 309 F. 3d 662, 666 (9th Cir. 2002) did not apply to only

See Selective Serv. Sys. v. Minn. Pub. Interest Research Group, 468 U.S. 841 (1984) (any person who fails to register for the draft disqualified for student financial aid); *Fleming*, 363 U.S. at 614 (1960) (persons deported for a wide variety of reasons including membership in the Communist Party denied social security benefits); *DeVeau v. Braisted*, 363 U.S. 144 (1960) (convicted felons prohibited from serving as officers of a waterfront union). In contrast to those cases, were Congress to target only one individual and his associates from amongst those who had failed to register for the draft, or one felon and his allies, a court should consider whether Congress had a non-punitive basis for singling out that individual or specific group, and not simply whether congress had a rational reason to prohibit student aid for non-registrants or proscribe felons from union positions.

The statute under review is a "historical departure from an unbroken American practice and tradition." *See* ROBERT JACKSON, MEMORANDUM CONCERNING H.R. 9766 ENTITLED "AN ACT TO DIRECT THE DEPORTATION OF HARRY RENTON BRIDGES," *reprinted in* S. REP. NO. 76-2031, pt. 1, at 9 (1940). It represents the first time that an act of Congress singled out a named corporation for debarment or suspension. What this Court noted in *Plaut v. Spendthrift Farm*, 514 U.S. 211, 230 (1995), applies equally here: "Apart from the statute we review

---

one specific, named corporation, but rather defined a narrow class of vessels because of their conduct, namely all vessels that spilled over a million gallons of oil into a marine environment after a certain date. *Dehainaut v. Pena*, 32 F. 3d 1066 (7th Cir. 1994) rejected a challenge to a Presidential order prohibiting the re-employment with the FAA of *all* air traffic controllers who had been terminated due to their strike participation.

today, we know of no instance where Congress [has taken this kind of action]. That prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed."

B. The Court Below's Refusal to Consider Whether Narrower, Less Burdensome Alternatives Existed By Which the Legislature Could have Achieved Its Asserted Objectives Conflicts With Holdings of this Court, the Ninth and D.C. Circuits and A Prior Decision of the Second Circuit.

This Court and various Circuits have held that a relevant inquiry in determining whether the legislature sought to inflict punishment on an individual, group or class, is the "existence of less burdensome alternatives" by which the government could have achieved its purportedly legitimate non-punitive objectives. *See Nixon*, 433 U.S. at 482; *Foretich*, 351 F.3d at 1222; *SeaRiver Maritime Financial Holdings v. Mineta*, 309 F. 3d 662, 677-8 (9th Cir. 2002); *Consolidated Edison Co. of N.Y., Inc. v. Pataki*, 292 F.3d. 338, 354 (2d Cir. 2002) (when a statute imposes a punishment "on an identifiable party ... we look beyond simply a rational relationship of the statute to a legitimate public purpose for 'less burdensome alternatives by which the legislature could have achieved its legitimate non-punitive objectives.'"). This judicial inquiry flows from *Nixon*'s holding that a statutory burden which is obviously disproportionate or excessive to achieve the legislature's putative interest belies any non-punitive goal.

In conflict with these holdings, the court below deemed irrelevant the obviously less burdensome alternatives that Congress could have used to achieve the government's

asserted interest in protecting the public fisc from the misuse of federal funds. App. A, 28a (approvingly citing a D.C. Circuit opinion, *BellSouth Corp. v. FCC*, 162 F.3d 678, 687 (D.C. Cir. 1998), for the proposition "that even if there were alternative ways of fulfilling legitimate government interests, 'it is up to the legislature to make this decision."). The challenged statutes here are clearly overbroad in two important respects.

First, the statutory provisions debarred ACORN and its associated organizations for a year until October 1, 2010, irrespective of the results of the Comptroller General's investigation. Thus, even had the Comptroller General concluded within the 180 days allotted for the investigation that ACORN had not committed any misuse of federal funds, the statutory bar continued for at least a year.[29] As the district court noted, "the unavailability of any means for ACORN to overcome the funding ban if the investigative report is favorable underscores the lack of a connection between the burdens of the statute and Congress' purpose in enacting it." App. B, 58a.

In contrast, any regulatory investigation in connection with a suspension of a federal contractor or grantee would reinstate the suspended contractor if the investigation

---

29. As it turned out, although the Comptroller General was unable to submit a final report within the mandated 180 days, it did file a preliminary report within that time period, which found no evidence whatsoever of any misuse of or mismanagement of federal funds by ACORN or any affiliated or allied organization. *See* U.S. GEN. ACCT. OFFICE, PRELIMINARY OBSERVATIONS ON FUNDING, OVERSIGHT, AND INVESTIGATIONS AND PROSECUTIONS OF ACORN OR POTENTIALLY RELATED ORGANIZATIONS (June 14, 2010), *available at* http://www.gao.gov/new.items/d10648r.pdf.

concluded that no misconduct occurred. 2 C.F.R. § 180.605. Indeed, Congress had an easily available less burdensome and often used appropriation technique of barring the use of certain funds unless an Executive agency (here the Government Accountability Office) certifies that certain conditions have been met, a technique it used in other sections of the challenged statutes unrelated to ACORN.[30]

Nonetheless, in conflict with *Nixon* and lower Court holdings, the court of appeals held that although there is "no provision in the appropriation laws that ties the GAO investigation with ACORN's status to receive federal funds," that obvious alternate, less burdensome ways of fulfilling legitimate government interests exist is irrelevant. App. A, 28a. The court below argued that Congress could "modify the appropriation laws following the GAO investigation." *Id.* However, the question is not what Congress might do, but whether the statute it enacted constituted punishment. What possible justification other than punishment could Congress have had to *not* tie the funding ban to the results of the GAO investigation and continue the ban even if the GAO investigation exonerated ACORN of wrongdoing.[31]

---

30. *See, e.g.*, Supplemental Appropriations Act of 2010, Pub. L. No. 111-32, § 1102 (2009) (authorizing certain funds for Afghanistan only if the Secretary of State reports that certain organization is cooperating with USAID in investigating past use of funds); Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, § 9003, 123 Stat. 3464 (2009) ($500 million in funds shall not be available until 5 days after the Secretary of Defense has completed review and reported to congressional committees). *See also id.* §§ 8046, 8048, 8050, 8060, 9011.

31. Nor do these statutes contain any provision for ACORN to overcome the debarment by demonstrating that it had undertaken significant reform efforts, as ACORN asserts it had, as the non-

Second, the sweeping prohibition on any federal funding for any ACORN affiliated or "allied organization," whether or not it is independently organized or incorporated, and whether the organization has itself committed any misconduct is overbroad and a less burdensome alternative is obvious. Congress could have defunded only those entities which had allegedly engaged in misconduct or were mismanaged, or found to be controlled by ACORN.

The court of appeals refused to consider whether any less burdensome alternatives existed to a statutory scheme barring any undefined "allied organization" of ACORN. Instead it held that "because ACORN and its related entities make up such an amorphous and sprawling family of organizations ... it was entirely reasonable for Congress to broadly exclude ACORN's affiliates, subsidiaries and allies from federal funds, and leave it to the agencies to determine which organizations would be excluded to further the congressional purpose of protecting the public fisc from ACORN's admitted mismanagement." App. A, 26a. The court ignored the statutory text, which doesn't permit the agencies discretion to make a determination of which ACORN allies or affiliates should be excluded to further the congressional purpose of protecting the public fisc, but mandates the exclusion of *all* ACORN's allied

---

punitive regulatory process allows. This Court has often noted that one indicia of a punitive and not merely regulatory statute is whether the statute contains a provision affording the affected party the opportunity to lift the disqualification. *Selective Service*, 468 U.S. at 851 ("'Far from attaching ... to past and ineradicable actions,' ineligibility of Title VI benefits 'is made to turn upon continuingly contemporaneous fact,' which a student who wants public assistance can correct." *Id.* at 851 (quoting *Communist Party of United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 87 (1961)).

organizations, irrespective of whether they are guilty of management or are under the control of ACORN.

Finally, the court below's determination that it was reasonable to bar all allied organizations of ACORN from federal funding conflicts with *United States v. Brown*, 381 U.S. 437 (1965). The *Brown* Court rejected a broad ban on all Communists from trade union positions because "even assuming that Congress had reason to conclude that some Communists would use union positions to bring about political strikes, "it cannot *automatically* be inferred that all members shar[e] their evil purposes or participat[e] in their illegal purpose. *Brown*, 381 U.S. at 456 (emphasis added). Here, the court below erred in upholding a statute that "automatically" infers that all of ACORN's allied organizations share mismanagement.

C. The Lower Court Treated Corporations Differently Than Individuals For Bill of Attainder Purposes in Contrast to This Court's Treatment of Corporations Under the First Amendment and in Conflict With This Court's Decision in *Lovett*.

In *United States v. Lovett*, 328 U.S. 303 (1946), this Court held that a congressional statute barring appropriations for three named government employees was an unconstitutional Bill of Attainder. The District Court relied on *Lovett* here, rejecting the government's attempts to distinguish that case. App. B 48a-52a.

The court of appeals distinguished *Lovett* on several grounds. First, while recognizing that the Second Circuit had held that corporations were afforded the protections of the Bill of Attainder Clause, it sought to distinguish

individuals from corporations, noting that certain actions may be punitive if taken against individuals, but not against a corporation. "In comparison to penalties levied against individuals, a temporary disqualification from funds or deprivation of property aimed at a corporation may be more *an inconvenience* than punishment." App. A, 20a (emphasis added).

However, this Court in *O'Hare Truck Service Inc. v. City of Northlake*, 518 U.S. 719, 722–23 (1996), held that a corporation was entitled to the same First Amendment protections with respect to deprivation of government contracts as an individual employee has with respect to employment. *See also Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973) (no "difference of constitutional magnitude between the threat of job loss to an employee of the state, and a threat of loss of contracts to a contractor" in finding plaintiffs disqualification for contracts was a "penalty" in Fifth Amendment context); *see Bd. of County Comm'rs. v. Umbehr*, 518 U.S. 668, 679 (1996) (listing cases). This Court has also "rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'" *Citizens United v. FEC*, ___U.S.__, 130 S. Ct. 876, 900 (2010). As the D.C. Circuit put it, "[a] corporation may contract and may engage in the common occupations of life, and should be afforded no lesser protection under the Constitution than an individual to engage in such pursuits." *Old Dominion Dairy v. Secretary of Defense*, 631 F.2d 953, 962 (D.C. Cir. 1980).

While the *Lovett* ban was permanent (although unlike here, Lovett could be reemployed at any time

with the advice and consent of the Senate[32]) and the ban here is not, various Circuits have explicitly disagreed with the court below's conclusion that a one year bar on government contracting (which now is a two year bar and may be continued indefinitely), is a "mere inconvenience." The D.C. Circuit and other circuits have recognized that even a temporary ban on government contracting can have "harsh" consequences and is a "very serious matter" for government contractors. *Sloan v. Dep't of Housing and Urban Dev.*, 231 F.3d 10, 17 (D.C. Cir. 2000); *Gonzalez v. Freeman*, 334 F.2d 570 (D.C. Cir. 1964). Because of these serious consequences and the stigma to an organization's reputation, these courts have accorded corporations a liberty interest in avoiding even a short-term debarment or suspension. *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 598 (D.C. Cir. 1993) (four-month suspension of airline by DOD that was then lifted "imposed a sure stigma [on airline]; branding the airline unsafe creates a lasting blemish on a company's reputation"); *Transco SEC v. Freeman*, 639 F.2d 318, 321 (6th Cir. 1981) ("One who has been dealing with the government on an ongoing basis may not be blacklisted, whether by suspension or debarment, without being afforded procedural safeguards"); *Trifax Corp. v. District of Columbia*, 314 F.3d 641, 643 (D.C. Cir. 2003).

The court below also sought to avoid *Lovett*'s conclusion that a cutoff of appropriations to named employees constituted punishment by asserting that the corporate "plaintiffs are not prohibited from any activities; they are only prohibited from receiving federal funds to continue their activities." App. A, 21a. This assertion misunderstands the nature of the burden

---

32. 328 U.S. at 305

imposed on these corporations and is in direct conflict with *Lovett*. The Circuit ignored the undisputed fact that plaintiffs' contracts were terminated and suspended, and failed to explain how plaintiffs "are not prohibited from any activities" when they can no longer perform the contractual services that HUD and other agencies agreed they should perform. The Circuit's analysis was also explicitly rejected in *Lovett*, where this Court dismissed the argument that Congress had not precluded Lovett from engaging in his work, but simply being paid by federal appropriations. *Lovett*, 328 U.S. at 313.

The Second Circuit's decision permitting Congress' temporary debarment or suspension of a specific corporation from government contracting because the entity was significantly mismanaged poses a serious danger to the long established regulatory regime for suspension and debarment of government contractors, and the due process requirements recognized as constitutionally mandated by both courts and the executive branch. *See* A.B.A., *supra* at 1. The danger that the decision will encourage Congress to single out other corporations warrants this Court's review.

D. The Court of Appeals Set an Impermissibly High Bar to Determine Whether Congress Had Found an Individual Entity Guilty of Misconduct that Conflicts with This Court's Holding in *Lovett* and the D.C. Circuit's Holding in *Foretich*, and is Inconsistent with the History and Purpose of the Bill of Attainder Clause

A critical component of a Bill of Attainder is the legislature's determination of an individual's guilt. This Court in *Lovett* and other cases made clear that a formal

legislative determination of guilt is not an essential component of an Attainder, but rather the guilt can be ascertained from the context, nature and circumstances of the legislative action. *Lovett*, 328 U.S. at 313-16; *Brown*, 381 U.S. at 460, *Foretich* 351 F. 3d supra at 1226

Despite *Lovett*'s holding, the court below stressed that "the appropriations laws themselves do not mention ACORN's guilt in any way," and that "unlike *Lovett*, here, there was no congressional 'trial' to determine ACORN's guilt." App. A, 22a. However, the court of appeals claim that there was a "congressional finding of guilt in that case [Lovett]" is erroneous. App. A, 31a (emphasis in original) The *Lovett* statute made no mention of guilt; the guilty "verdict" was that of a House committee, not of Congress, and the Senate pointedly refused to concur in finding guilt. *Lovett*, 328 U.S. at 305 n.1, 312–13, 316. Here, while no committee "tried" ACORN, the funding ban was largely based on the 88-page *Issa Report*, the executive summary of which was entered into the Congressional Record by Senator Johanns, the sponsor of all of the challenged statutes in the Senate.[33] The decision below leads to the odd result that a statute enacted after a House committee trial is a Bill of Attainder, yet a statute enacted based on a report by a committee leader that certain organizations constitute a "criminal enterprise," affording the organizations no opportunity at all to refute the charges, is not. *See also The Second Circuit Holds That Law Barring ACORN From Receiving Federal Funds is Not a Bill of Attainder*, *supra* at 864. ("The Second

---

33. 155 Cong. Rec. S9308, 9309-10 (daily ed. Sep. 14, 2009); 155 Cong. Rec. S9499, 9517-9518 (daily ed. Sep. 17, 2009); 155 Cong. Rec. S9683, 9685 (daily ed. Sep. 22, 2009); 155 Cong. Rec. S10181, 10207 (daily ed. Oct. 7, 2009); 155 Cong. Rec. S11313 (daily ed. Nov. 10, 2009).

Circuit's reasons for holding that the provisions at issue were not intended to impute guilt ... were unconvincing.").

Here not only is there overwhelming evidence that members of Congress supported this ban because they believed ACORN guilty of serious misconduct, see *supra* pp. 6-9, but as the district court correctly observed, "[wholly] apart from the vociferous comments by various members of Congress as to ACORN's criminality and fraud ... no reasonable observer could suppose that such severe action would have been taken in the absence of a conclusion that misconduct had occurred." App. B, 53a.

Moreover, the court of appeals implicitly held that Congress found ACORN guilty of significant mismanagement in reasoning that Congress could bar funding to a corporation that has "admitted to significant mismanagement." App. A, 21a; *see also* 26a (statute designed to protect public fisc against ACORN's admitted mismanagement). But ACORN has not admitted to any current corporate mismanagement, and the court cites to nothing in the record to support its conclusion that ACORN "admitted" that it was guilty of "significant mismanagement" at the time the ban was enacted. As the district court found, ACORN disputed the allegations against it, terminated employees found guilty of misconduct, acknowledged that it had made mistakes in the past, and claimed that it had instituted significant reforms prior to Congress' decision to bar it from federal funding.[34] App. B, 36a, 35a. A crucial, disputed

34. The independent Harshbarger report, commissioned by ACORN but not an ACORN-authored report, pointed out past managerial problems, stated that the ACORN management had undertaken significant reforms, and noted that management weaknesses remained, a far cry from "admitted significant

issue was whether at the time ACORN was debarred, it was in fact guilty of any significant mismanagement or misconduct warranting such action. It would be punitive to impose the ban because of the past embezzlement by ACORN's CEO a decade earlier or the conviction of some lower level ACORN employees without any showing that ACORN in 2009 was engaged in any misconduct or mismanagement, and ACORN has certainly not admitted to that. That Congress, according to the court below, determined ACORN to be guilty of "admitted significant mismanagement" and banned ACORN and its entire "web" of allied organizations in response to that determination of guilt, simply illustrates the punitive nature of the bar.

CONCLUSION

For all of the above reasons, petitioners urge this Court to grant review in this case.

Dated: New York, New York
February 22, 2011

Respectfully Submitted,

DARIUS CHARNEY
Counsel of Record
JULES LOBEL
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6475
dcharney@ccrjustice.org

---

mismanagement." *See* Scott Harshbager, *An Independent Governance Assessment of ACORN: A Path to Meaningful Reform* (Dec. 7, 2009), *available at* http://www.proskauer.com/files/uploads/report2.pdf.

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED AUGUST 13, 2010

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Civil Action Nos. 09-5172-cv (L), 10-0992-cv (CON)

618 F. 3d 125

Decided: August 13, 2010
As Corrected September 7, 2010

ACORN, ACORN INSTITUTE, INC., and MHANY MANAGEMENT, INC., f/k/a/ New York Acorn Housing Company, Inc.,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, SHAUN DONOVAN, Secretary of the Department of Housing and Urban Development, PETER ORSZAG Director Office of Management and Budget, TIMOTHY R. GEITHNER JR., Secretary of the Department of Treasury of the United States, LISA P. JACKSON, Administrator of the Environmental Protection Agency, GARY LOCKE, Secretary of Commerce, and ROBERT GATES, Secretary of Defense,

Defendants-Appellants.

Appendix A

Before: MINER, CABRANES, and WESLEY, Circuit Judges.

OPINION

MINER, *Circuit Judge*:

Defendants-appellants, Shaun Donovan, Secretary of Housing and Urban Development ("HUD"); Peter Orszag, Director of the Office of Management and Budget ("OMB"); Timothy Geithner, Secretary of the Treasury; Lisa Jackson, Administrator of the Environmental Protection Agency ("EPA"); Gary Locke, Secretary of Commerce; Robert Gates, Secretary of Defense; and the United States (collectively, the "government" or "defendants"), appeal from a preliminary injunction entered on December 11, 2009, and a permanent injunction and declaratory judgment entered on March 10, 2010, in the United States District Court for the Eastern District of New York (*Gershon, J.*).

Plaintiffs-appellees, Association of Community Organizations for Reform Now ("ACORN"), Acorn Institute, and New York Acorn Housing Company[1] ("New York Acorn" or, collectively with ACORN and Acorn Institute, the "plaintiffs") brought this action challenging provisions in several federal appropriations laws barring the distribution of federal funds to ACORN and its affiliates, subsidiaries, and allied organizations.

---

1. New York Acorn has recently changed its name to MHANY Management, Inc.

Appendix A

The District Court struck down the challenged provisions, holding that (1) the plaintiffs have Article III standing to challenge the appropriations laws against all of the defendants, including the Secretary of Defense and the Director of OMB; and (2) the appropriations laws singling out ACORN and its affiliates from obtaining federal funds (a) fell within the historical meaning of legislative punishment, (b) did not further a non-punitive legislative purpose, and (c) were supported by a legislative record that evinced an intent to punish. Accordingly, the court enjoined the defendants from enforcing the challenged provisions of the appropriations laws.

I. BACKGROUND

A. The Plaintiffs

ACORN is a non-profit Arkansas corporation that organizes low- and moderate-income persons "to achieve social and economic justice." Specifically, ACORN has helped over two million people register to vote, advocated for increasing the minimum wage, worked against predatory lending, prevented foreclosures, assisted over 150,000 people file their tax returns, and "worked on thousands of issues that arise from the predicaments and problems of the poor, the homeless, the underpaid, the hungry and the sick." ACORN has 500,000 members located in 75 cities across the United States, with its national offices located in Brooklyn, New York, Washington, D.C., and New Orleans, Louisiana. ACORN has received 10% of its funding from the federal government and otherwise has received funding from various national and local sources.

Appendix A

Acorn Institute is a non-profit New Orleans corporation that has a "separate corporate existence from ACORN, with a separate board of directors and separate management." Acorn Institute, however, collaborates closely and contracts with ACORN to carry out many of the grants which Acorn Institute receives from, *inter alios*, the federal government. Similar to ACORN, Acorn Institute is involved with civil rights, employment, housing, and social-service issues of low-income communities. As of September 2009, Acorn Institute employed twenty employees, with its office located in New Orleans, Louisiana.

New York Acorn is a non-profit New York corporation that "owns, develops and manages housing affordable to low income families." New York Acorn controls over 140 buildings and 1,200 apartments located throughout the boroughs of New York City. New York Acorn is a separate entity from ACORN but is considered an ally or affiliate of ACORN.[2] New York Acorn receives part of its funds by way of subcontracting-grants from the New York State Housing Finance Agency, which, in turn, receives federal funds from HUD for such subcontracting purposes. New York Acorn employs an office staff of thirteen persons and a maintenance staff of twenty-four persons.

The legal and governance structure of ACORN and its "separate but interrelated components," such as Acorn

2. Following oral argument, HUD determined for purposes of its appropriations law that New York Acorn "is not an affiliate, subsidiary or allied organization of ACORN." Post-Argument Letter of the United States (dated July 8, 2010).

Institute and New York Acorn, is "incredibly complex," and at one point the ACORN "[f]amily" was estimated at approximately 200 entities. As found in an internal report issued by ACORN in 2008, however, the ACORN family -- which still included Acorn Institute and New York Acorn -- had diminished to 29 entities by that time.

B. Mismanagement, Fraud, and Congressional Response

In 1999 and 2000, Dale Rathke, the brother of ACORN's founder Wade Rathke, embezzled nearly $1 million from the organization. Upon discovery of the embezzlement, "a small group of executives decided to keep the information from almost all of the group's board members and not to alert law enforcement." A restitution agreement was signed in which the Rathke family "agreed to repay, [beginning in 2001], the amount embezzled in exchange for confidentiality." In June 2008, however, a whistleblower forced ACORN to disclose the embezzlement, and at that time ACORN's mismanagement came under serious public scrutiny. ACORN immediately prepared an internal report noting, among other issues, "potentially improper use of charitable dollars for political purposes" as well as possible violations of federal law by ACORN and its "web" of nearly 200 affiliated organizations.

ACORN's reputation suffered further upon accusations of voter registration fraud, for which ACORN's workers had been convicted in prior years. Between October 2008 and May 2009, two more ACORN workers were charged with, and convicted of, voter registration fraud. While

ACORN adopted "several good-governance policies" to address the problems identified in the internal report, a new scandal arose in the summer of 2009 when "hidden camera" videos revealed ACORN employees and volunteers providing advice and counseling in support of a proposed prostitution business.

In response to these events, ACORN commissioned an independent report to analyze "the videos that caused this summer's uproar" and "the entire organization, its core weaknesses and inherent strengths." The report, referred to as the "Harshbarger Report" because it was prepared by Scott Harshbarger, cited many of the problems of management previously noted in the internal report issued in 2008. Although the Harshbarger Report revealed that the hidden-camera videos were heavily edited, "manipulated," and "distorted," the report nonetheless criticized ACORN's "organizational and supervisory weakness" and overall failure to provide adequate organizational infrastructure necessary to manage and oversee its operations.

In September 2009, the U.S. Census Bureau and the Internal Revenue Service, both of which collaborated with ACORN on certain programs, ended their relationship with ACORN due to its negative publicity. That same month, members of Congress asked the Government Accountability Office ("GAO") to initiate an investigation into ACORN's activities because "there remain[ed] significant concern that millions of taxpayer dollars were used improperly, and possibly criminally, by the organization." Several states suspended their funding of

ACORN and its affiliates. In the State of Nevada, ACORN and two of its employees were charged with participating in an illegal voter registration scheme.

On October 1, 2009, Congress passed a "stop-gap" appropriations law to fund federal agencies prior to the enactment of the 2010 Fiscal Year appropriations. *See* Continuing Appropriations Resolution ("Continuing Resolution"), 2010, Pub. L. No. 111-68, Div. B, § 163, 123 Stat. 2023, 2053 (2009). Section 163 of the Continuing Resolution singled out ACORN as follows:

> None of the funds made available by this joint resolution or any prior Act may be provided to the Association of Community Organizations for Reform Now ACORN, or any of its affiliates, subsidiaries, or allied organizations.

Id. The provisions of the Continuing Resolution -- including Section 163 -- were set to expire on December 18, 2009. *See* Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Division B -- Further Continuing Appropriations, 2010, § 101, Pub. L. No. 111-88, 123 Stat. 2904, 2972 (2009).

In a memorandum dated October 7, 2009, the Director of OMB advised the heads of all executive agencies, *inter alia*, (1) that Section 163 prohibited them from providing any federal funds to ACORN and its affiliates, subsidiaries, and allied organizations during the period of the Continuing Resolution; (2) to suspend any existing contracts with ACORN and its affiliates "where

permissible"; and (3) to take steps "so that no Federal funds are awarded or obligated by your grantees or contractors to ACORN or its affiliates as subcontractors, or other subrecipients." In a subsequent memorandum, the Office of Legal Counsel clarified that Section 163 would not prohibit funds to be paid pursuant to binding contractual obligations that predated the exclusion.

C. Entry of Preliminary Injunction and Subsequent Developments

On November 12, 2009, the plaintiffs commenced an action in the District Court to enjoin the United States, the Secretary of the Treasury, the Secretary of HUD, and the Director of OMB from enforcing Section 163. In its complaint, the plaintiffs argued that the appropriations laws violated the *First Amendment*, the *Due Process Clause*, and the *Bill of Attainder Clause*. The plaintiffs then moved for a preliminary injunction, which the court granted in an opinion and order filed on [*132] December 11, 2009, after concluding that the plaintiffs showed a likelihood of success on its bill-of-attainder claim. The District Court did not address the plaintiffs' remaining *First Amendment* and due process claims. In response to the District Court's ruling, the OMB rescinded its memorandum addressing the heads of all executive agencies on Section 163. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-10-02, GUIDANCE ON SECTION 163 OF THE CONTINUING RESOLUTION REGARDING THE ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW (ACORN) (Oct. 7, 2009), *available at*

http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-02.pdf (last visited Aug. 10, 2010).

Meanwhile, Congress passed appropriations laws for fiscal year 2010, which President Obama signed into law. *See* Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034 (2009); Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, 123 Stat. 3409 (2009). One section of the appropriations laws used identical language to that of Section 163 and specifically excluded ACORN and its "affiliates, subsidiaries, and allie[s]" from federal funding. Four sections of the appropriations laws similarly excluded ACORN and its "subsidiaries" from federal funding.[3] In addition to the specific exclusion of ACORN from federal funding, the appropriations laws included Section 535, which directed the GAO to "conduct a review and audit of the Federal funds received by ACORN or any subsidiary or affiliate of ACORN" to determine

> (1) whether any Federal funds were misused and, if so, the total amount of Federal funds involved and how such funds were misused;

---

3. The Department of the Interior, Environment, and Related Agencies Appropriations Act of 2010, Pub. L. No. 111-88, Division A, Section 427; Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, Division A, Section 418; Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, Division B, Section 534; Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, Division E, Section 511; and The Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, Division A, Section 8123.

> (2) what steps, if any, have been taken to recover any Federal funds that were misused;
>
> (3) what steps should be taken to prevent the misuse of any Federal funds; and
>
> (4) whether all necessary steps have been taken to prevent the misuse of any Federal funds[.]

Commerce, Justice, Science, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-117, Div. B, § 535, 123 Stat. 3034, 3157-58 (2009). Section 535 required the GAO to submit its report "[n]ot later than 180 days after the enactment of this Act." *Id.* at 3158.

D. Declaratory Relief and Permanent Injunction

On consent of the government, the plaintiffs filed an amended complaint challenging the five sections of the latest appropriations laws, in addition to the by-then-expired Section 163. The amended complaint included the three remaining defendants in this appeal: the Administrator of the EPA; the Secretary of Commerce; and the Secretary of Defense.

In a judgment filed on March 10, 2010, the District Court granted the plaintiffs' request for declaratory relief and a permanent injunction. Specifically, the District Court held that the appropriations laws constituted unconstitutional bills of attainder; that the plaintiffs possessed standing to bring these claims against the named defendants; and that a permanent injunction

was warranted in light of the unconstitutionality of the appropriations laws and the irreparable injuries suffered by the plaintiffs. As with its granting of the plaintiffs' motion for a preliminary injunction, the District Court again declined to reach the plaintiffs' *First Amendment* and due process claims in light of its determination that the challenged laws were bills of attainder.

The government timely appealed the District Court's judgment, and we subsequently granted the government's motion to stay the injunction pending the appeal. On appeal, the government argues (1) that the plaintiffs lack standing against two of the defendants, namely, the Secretary of Defense and the Director of OMB, because the plaintiffs cannot show an actual injury that is fairly traceable to any current or anticipated actions by these two defendants; and (2) that the District Court erroneously determined the appropriations laws to be bills of attainder, because (a) the challenged laws are not congruent with any historical understanding of punishment; (b) the challenged laws do not constitute punishment as a functional matter; and (c) the legislative record does not evince an unmistakably punitive purpose.

II. DISCUSSION

A. Standard of Review

We review a district court's grant of a permanent injunction for abuse of discretion. *Reynolds v. Giuliani*, 506 F.3d 183, 189 (2d Cir. 2007). A district court abuses its discretion "when (1) its decision rests on an error of

law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision -- though not necessarily the product of a legal error or a clearly erroneous factual finding -- cannot be located within the range of permissible decisions." *Kickham Hanley P.C. v. Kodak Ret. Income Plan*, 558 F.3d 204, 209 (2d Cir. 2009) (internal quotation marks omitted). Our review of questions of law is *de novo*. *See, e.g., Spiegel v. Schulmann*, 604 F.3d 72, 76 (2d Cir. 2010); *Ascencio-Rodriguez v. Holder*, 595 F.3d 105, 110 (2d Cir. 2010); *Donk v. Miller*, 365 F.3d 159, 164 (2d Cir. 2004).

B. Standing to Sue the Secretary of Defense and the Director of OMB

The jurisdiction of the federal courts is limited to the resolution of "cases" and "controversies." U.S. Const. art. III, § 2. The corollary of this restriction is that the challenging party must have "standing" to pursue its case in federal court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). Standing is established where (1) the challenging party has "suffered an 'injury in fact' -- an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, rather than conjectural or hypothetical"; (2) there is "a causal connection between the injury and the challenged conduct"; and (3) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Gully v. Nat'l Credit Union Admin. Bd.*, 341 F.3d 155, 160-61 (2d Cir. 2003) (internal quotation marks omitted). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 161.

The government challenges the plaintiffs' standing to sue the Secretary of Defense and the Director of OMB. The government argues that, unlike the other defendants in this appeal, the plaintiffs have never received -- and do not intend to apply for -- grants or contracts from the Department of Defense. The government also argues that the plaintiffs have not suffered any injury caused by OMB because Section 163 is no longer effective; OMB rescinded its memorandum advising the heads of all the executive agencies; and, in any event, OMB has no authority to enforce federal statutes.

The plaintiffs cannot be said to lack standing to sue a government agency constrained to enforce a law that specifically names ACORN and prevents the plaintiffs from receiving federal funds. *Cf. Foretich v. United States*, 351 F.3d 1198, 1213, 359 U.S. App. D.C. 54 (D.C. Cir. 2003) (holding that plaintiff had standing to challenge as a bill of attainder a statute that deprived him of his child visitation rights -- even though his child was eighteen and the statute no longer had any effect on his right to see her -- because "Congress's act of judging [Foretich] and legislating against him on the basis of that judgment . . . directly give[s] rise to a cognizable injury to his reputation"); *see also* 5 U.S.C. § 702 (when enjoining the United States for agency actions, the court is required to name all officials who are responsible for compliance with the injunction). Even if the plaintiffs are not and never will be interested in applying for grants or funding from the Department of Defense, the fact that the defense department's appropriations law specifically prohibits ACORN and its affiliates from being eligible for federal funds affects the plaintiffs' reputation with other agencies, states, and

private donors. *See Gully*, 341 F.3d at 162 ("The Supreme Court has long recognized that an injury to reputation will satisfy the injury element of standing.").

The government's argument that the plaintiffs lack standing to sue the Director of OMB is similarly misplaced. Although the government asserts that OMB has no authority to enforce federal statutes, OMB "oversee[s] the execution" of the federal budget and has a continuing responsibility to explain appropriations provisions to agencies. *See* U.S.C.A. Reorg. Plan 2 1970, 84 Stat. 2085,, *as amended by* Pub. L. No. 97-258, § 5(b), 96 Stat. 1068, 1085 (1982) (stating that the OMB performs the "key function of assisting the President in the preparation of the annual Federal budget and overseeing its execution"). *See generally id.* ("While the budget function remains a vital tool of management, ... [t]he new Office of Management and Budget will place much greater emphasis on the evaluation of program performance ... [and] expand efforts to improve interagency cooperation."). To that end, OMB's now-rescinded memorandum -- which is the basis for the plaintiffs' claim of reputational injury with respect to Section 163 -- was issued. As explained by the District Court, notwithstanding the rescission of the OMB memorandum and expiration of Section 163, the OMB memorandum continues to exert influence over the plaintiffs' reputation:

> Following [the District Court's entry of a preliminary injunction], OMB did send an email to all federal agencies' general counsels informing them of the injunction entered.

> ... and that the government was considering appeal, but OMB did not direct them to inform their agencies, grantees, and grantees' subcontractors of this court's ruling. The reputational harm, therefore, continues, as the original advice from OMB to the hundreds, if not thousands, of recipients of that advice has never been rescinded.

Indeed, the OMB memorandum providing guidance for application of Section 163 is still available on OMB's website. *See* OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-10-02, GUIDANCE ON SECTION 163 OF THE CONTINUING RESOLUTION REGARDING THE ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW (ACORN) (Oct. 7, 2009), *available at* http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-02.pdf (last visited Aug. 10, 2010). Although the website states that the memorandum has been rescinded, there is also a notation that "the enacted restrictions on funding ACORN and affiliates . . . remain in force" in light of this Court's granting the government's motion for a stay pending appeal. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, MEMORANDA 2010, http://www.whitehouse.gov/omb/memoranda_default/ (last visited Aug. 10, 2010). Thus, what is called a rescission in fact functioned in no such way. In light of OMB's actual and continuing responsibility to oversee the management of the budgets of Executive Branch agencies, and its consequent impact on the plaintiffs' reputation, the plaintiffs have shown sufficient injury to bring suit against the Director of the OMB.

We therefore affirm the judgment of the District Court with regard to the issue of standing.

C. Bill of Attainder

The Constitution prohibits the enactments of "bills of attainder." *See* U.S. Const. art. I, § 9 (prohibiting Congress); *id.* § 10 (prohibiting states). Historically, a bill of attainder

> was a device often resorted to in sixteenth, seventeenth and eighteenth century England for dealing with persons who had attempted, or threatened to attempt, to overthrow the government. In addition to the death sentence, attainder generally carried with it a "corruption of blood," which meant that the attainted party's heirs could not inherit his property. The "bill of pains and penalties" was identical to the bill of attainder, except that it prescribed a penalty short of death, *e.g.*, banishment, deprivation of the right to vote, or exclusion of the designated party's sons from Parliament. Most bills of attainder and bills of pains and penalties named the parties to whom they were to apply; a few, however, simply described them. While some left the designated parties a way of escaping the penalty, others did not.

United States v. Brown, 381 U.S. 437, 441-42, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965) (footnotes omitted).

The scope of the *Bill of Attainder Clause*, however, has been interpreted as wider than the historical definition of a "bill of attainder." *See Matter of Extradition of McMullen*, 989 F.2d 603, 606-07 (2d Cir. 1993) (en banc) ("[T]he *Bill of Attainder Clause* broadly . . . prohibit[s] bills of pains and penalties as well as bills of attainder."); *South Carolina v. Katzenbach*, 383 U.S. 301, 324, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966) (stating that the *Bill of Attainder Clause* provides "protections for individual persons and private groups"); *Brown*, 381 U.S. at 442 (stating that the Constitution's prohibition against bills of attainder "was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply -- trial by legislature"). Indeed, it can be said that the broadness of the American prohibition of bills of attainder under Article I, section 9 is more a reflection of the Constitution's concern with fragmenting the government power than merely preventing the recurrence of unsavory British practices of the time. *See generally* Roger J. Miner, *Identifying, Protecting and Preserving Individual Rights: Traditional Federal Court Functions*, 23 SETON HALL L. REV. 821, 826-30 (1992-1993) (discussing bills of attainder).

In its contemporary usage, the *Bill of Attainder Clause* prohibits any "law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 846-47, 104 S. Ct. 3348, 82 L. Ed. 2d 632 (1984). That

is, the Supreme Court has identified three elements of an unconstitutional bill of attainder: (1) "specification of the affected persons," (2) "punishment," and (3) "lack of a judicial trial." *Id.* at 847. Although the Supreme Court has never had occasion to rule on the issue, we have held that the scope of the "specification of the affected persons" element includes corporate entities. *See Con. Edison Co. of N.Y., Inc. v. Pataki*, 292 F.3d 338, 349 (2d Cir. 2002) ("We therefore hold that corporations must be considered individuals that may not be singled out for punishment under the *Bill of Attainder Clause*.." (internal quotation marks, alteration, and citation omitted)).

With respect to the existence *vel non* of punishment, three factors guide our consideration: (1) whether the challenged statute falls within the historical meaning of legislative punishment (historical test of punishment); (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes" (functional test of punishment); and (3) whether the legislative record "evinces a [legislative] intent to punish" (motivational test of punishment). *Selective Serv. Sys.*, 468 U.S. at 852. All three factors need not be satisfied to prove that a law constitutes "punishment"; rather, "th[e] factors are the evidence that is weighed together in resolving a bill of attainder claim." *Con. Edison*, 292 F.3d at 350.

Because the government does not challenge the District Court's determination that the specificity and lack-of-judicial-trial elements are satisfied in this case, we focus on whether the laws constitute the type of

"punishment" that runs afoul of the *Bill of Attainder Clause*.

1. Historical Test of "Punishment"

The Supreme Court has recognized that certain types of punishment are "so disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have been held to fall within the proscription of the [*Bill of Attainder Clause*]." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 473, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977). "The classic example is death, but others include imprisonment, banishment, the punitive confiscation of property, and prohibition of designated individuals or groups from participation in specified employments or vocations." *Con. Edison*, 292 F.3d at 351 (internal quotation marks, alteration, and ellipsis omitted). A familiar theme in these classic examples of punishment is the initial determination by the legislature of "guilt." *See De Veau v. Braisted*, 363 U.S. 144, 160, 80 S. Ct. 1146, 4 L. Ed. 2d 1109 (1960) ("The distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt.").

Here, the plaintiffs analogize the appropriations laws to the "cutoff of pay to specified government employees held to constitute punishment for purposes of the *Bill of Attainder Clause* [in *United States v. Lovett*, 328 U.S. 303, 317-18, 66 S. Ct. 1073, 90 L. Ed. 1252, 106 Ct. Cl. 856 (1946)]." In the plaintiffs' view, that the appropriations laws do not constitute a permanent ban or disqualification of ACORN from federal funds is

immaterial because "the consequences of even a temporary ban on government funding for government contractors can be potentially harsh." Moreover, the plaintiffs argue that the appropriations laws precluding ACORN from receiving federal funds, despite having an expiration date, could be renewed every year and therefore constitute a *de facto* permanent ban.

The withholding of appropriations, however, does not constitute a traditional form of punishment that is "considered to be punitive per se." *See Con. Edison*, 292 F.3d at 351. Congress's decision to withhold funds from ACORN and its affiliates constitutes neither imprisonment, banishment, nor death. The withholding of funds may arguably constitute a punitive confiscation of property at some point, but the plaintiffs do not assert that they have property rights to federal funds that have yet to be disbursed at the agency's discretion. We note, further, that "[t]here may well be actions that would be considered punitive if taken against an individual, but not if taken against a corporation." *Id.* at 354. In comparison to penalties levied against individuals, a temporary disqualification from funds or deprivation of property aimed at a corporation may be more an inconvenience than punishment. While ACORN claims that it will be "drive[n] close to bankruptcy" and may suffer a "corporate death sentence" without federal funds, the Harshbarger Report reveals that ACORN only derives 10% of its funding from federal grants. Thus, we doubt that the direct consequences of the appropriations laws temporarily precluding ACORN from federal funds are "so disproportionately severe" or "so inappropriate" as to

constitute punishment *per se*. *See Nixon*, 433 U.S. at 472 ("Forbidden legislative punishment is not involved merely because the Act imposes burdensome consequences.").

As asserted by the plaintiffs, the appropriations laws "attaint ACORN with a note of infamy ... [and] encourage others to shun ACORN." But the plaintiffs are not prohibited from any activities; they are only prohibited from receiving federal funds to continue their activities. Although the appropriations laws may have the effect of alienating ACORN and its affiliates from their supporters, Congress must have the authority to suspend federal funds to an organization that has admitted to significant mismanagement. The exercise of Congress's spending powers in this way is not "so disproportionately severe and so inappropriate to nonpunitive ends" as to invalidate the resulting legislation as a bill of attainder. *See Nixon*, 433 U.S. at 473; *cf. Sabri v. United States*, 541 U.S. 600, 605, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004) ("Congress has authority under the Spending Clause to appropriate federal moneys to promote the general welfare, and it has corresponding authority under the Necessary and Proper Clause to see to it that taxpayer dollars appropriated under that power are ... not frittered away in graft or on projects undermined when funds are siphoned off or corrupt public officers are derelict about demanding value for dollars." (internal citations omitted)). And, in any event, according to the plaintiffs, at least one state that had previously suspended funding to the plaintiffs has restored funding to New York Acorn. *See* 28(j) Letter on Behalf of ACORN (dated June 22, 2010). Thus, the plaintiffs' claim of alienation -- that is, their claim that

they have been tainted with "a note of infamy" -- is not as severe as the plaintiffs assert.

Of course, as discussed in more detail *infra* Analysis II(B)(3) (Motivational Test of Punishment), there is some evidence in the record indicating that ACORN was precluded from receiving federal funds upon the legislature's determination that ACORN was guilty of abusive and fraudulent practices. This evidence points in the direction of a traditional form of punishment. *See De Veau*, 363 U.S. at 160. "The fact that the punishment is inflicted through the instrumentality [*138] of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal." *Lovett*, 328 U.S. at 316. Nonetheless, despite statements about ACORN's guilt on the legislative floor, the appropriations laws themselves do not mention ACORN's guilt in any way. *Cf. Con. Edison*, 292 F.3d at 344 (the challenged law expressly found that Consolidated Edison had failed "to exercise reasonable care"). Moreover, unlike *Lovett*, here, there was no congressional "trial" to determine ACORN's guilt. *Cf. Lovett*, 328 U.S. at 310-12 (involving a secret congressional trial for engaging in subversive Communist activities, with the suspected Communists allowed to testify in their defense). As the Supreme Court noted in *Flemming v. Nestor*, 363 U.S. 603, 617-19, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960), where a court is left only with the legislative history of a law that is impugned as a bill of attainder, there must be "unmistakable evidence of punitive intent [in the legislative history] . . . before

a Congressional enactment of this kind may be struck down." Although there is some evidence of a determination of guilt in the legislative history of the appropriations laws, for the reasons stated *infra* Analysis II(B)(3) (Motivational Test of Punishment), there is not "unmistakable evidence" of congressional intent to punish within the contemplation of the *Bill of Attainder Clause*. We therefore find no basis for drawing the conclusion that the challenged appropriations laws constitute "punishment" as it was historically understood.

2. Functional Test of Punishment

The functional test of punishment looks to whether the challenged law, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." *Nixon*, 433 U.S. at 475. "It is not the severity of a statutory burden in absolute terms that demonstrates punitiveness so much as the magnitude of the burden relative to the purported nonpunitive purposes of the statute." *Foretich*, 351 F.3d at 1222. Thus, "[a] grave imbalance or disproportion between the burden and the purported nonpunitive purpose suggests punitiveness, even where the statute bears some minimal relation to nonpunitive ends." *Id.*; *accord Con. Edison*, 292 F.3d at 350 ("Where a statute establishing a punishment declares and imposes that punishment on an identifiable party . . . we look beyond simply a rational relationship of the statute to a legitimate public purpose for less burdensome alternatives by which the legislature could have achieved its legitimate nonpunitive objectives." (internal quotation marks, ellipsis, and alterations omitted)).

Initially, the plaintiffs appear to suggest that the appropriations laws are presumptively unconstitutional bills of attainder because they specifically named ACORN for exclusion from federal funds. But Congress may single out an entity or person in its legislation. *See Nixon*, 433 U.S. at 469-72 (rejecting the argument that "the Constitution is offended whenever a law imposes undesired consequences on an individual or on a class that is not defined at a proper level of generality"); *Con. Edison*, 292 F.3d at 350 ("A legislature may legitimately create a 'class of one' for many purposes."). Although the specific naming of ACORN in the appropriations laws satisfies one classic mark of a bill of attainder -- and is certainly relevant in assessing the plausibility of the alleged punitive purposes of the challenged law, *see Foretich*, 351 F.3d at 1224 -- such specificity does not create a presumption of unconstitutionality. Because the party challenging a congressional law as an unconstitutional bill of attainder bears the burden of proof, *see Con. Edison*, 292 F.3d at 350 ("The party challenging the statute has the burden of establishing that the legislature's action *constituted punishment* and not merely the legitimate regulation of conduct." (internal quotation marks and alteration omitted) (emphasis added)), we accord no presumption that the appropriations laws specifying ACORN for exclusion constitute bills of attainder.

With respect to the non-punitive purpose for the appropriations laws, the government argues that Congress was motivated by its desire to "ensur[e] the effective expenditure of taxpayer dollars." According to the government, the appropriations laws at issue

here "provide a temporary response to incontrovertible evidence of mismanagement by organizations that are part of a complex, poorly-managed family of organizations, pending the findings of ongoing investigations." While acknowledging that Congress has a legitimate interest in ensuring the proper use of taxpayer money, the plaintiffs argue that the specificity of the affected parties, the uniqueness of the congressional action, and the breadth of restrictive action in this case render the appropriations laws disproportionately severe and thus "punitive" under the functional test of punishment. Specifically, the plaintiffs argue: (1) Congress singled out ACORN for exclusion despite other contractors having similar problems with mismanagement; (2) the appropriations laws, which affect ACORN and its affiliates, subsidiaries, and even allied organizations, is "clearly overbroad" in relation to the laws' purported legitimate purposes; (3) the appropriations laws bypass existing regulations that address concerns about funding mismanaged organizations, such as ACORN; and (4) the appropriations laws unnecessarily preclude ACORN's obtaining federal funds for one year, regardless of the results of the GAO's investigation of ACORN's operations, *i.e.*, even if the GAO concluded that ACORN was no longer plagued with mismanagement, the exclusion from federal funds would continue for the fiscal year.

We note that the plaintiffs' claim that the appropriations laws are punitive because they single out ACORN is undermined by the plaintiffs' claim that the appropriations laws are *also* punitive because they affect hundreds of unnamed "allied" and "affiliated"

organizations. If the appropriations laws affect such broad groups of organizations, then they are similar to a rule of general applicability and are less likely to have a punitive purpose. *See, e.g., Flemming*, 363 U.S. at 620 (rejecting claim that a law excluding certain deportees, *i.e.*, criminal, subversive, or illegal, from receiving social security benefits was not a bill of attainder because the law affected "the great majority of those deported" and because there was not unmistakable evidence that the law had a punitive purpose); *cf. Foretich*, 351 F.3d at 1224 ("[N]arrow application of a statute to a specific person or class of persons raises suspicion, because the *Bill of Attainder Clause* is principally concerned with the singling out of an individual for legislatively prescribed punishment." (internal quotation marks, alteration, and emphasis omitted)). Indeed, because ACORN and its related entities make up such an amorphous and sprawling family of organizations -- at one time consisting of approximately 200 entities governed by a structure that was "incredibly complex" -- it was entirely reasonable for Congress to broadly exclude ACORN's affiliates, subsidiaries, and allies from federal funds, and leave it to the agencies to determine which organizations would be excluded to further the congressional purpose of protecting the public fisc from ACORN's admitted failures in management. *See, e.g..*, Post-Argument Letter of the United States (dated July 8, 2010) (responding to the plaintiffs' post-argument submission by attaching an agency letter dated July 8, 2010, stating that HUD "has determined that [New York Acorn] is not an affiliate, subsidiary or allied organization of ACORN").

The plaintiffs' assertion that the appropriations laws are punitive because they bypass administrative procedures is also unpersuasive. Although a law that bypasses administrative procedures may "reinforce[]" the conclusion that the law was intended "to find guilt and order punishment directly," *Con. Edison*, 292 F.3d at 349, the same inference is difficult to draw when a *congressional appropriations* law is at issue. *Cf. id.* (finding violation of *Bill of Attainder Clause* where the legislative act, which prohibited Consolidated Edison from recovering costs from its ratepayers, was aimed at the allocation of private funds). While withholding federal funds may constitute punishment in certain circumstances, a temporary ban on federal assistance to the groups at issue here -- ACORN (which admitted to mismanagement and embezzlement and suffered numerous convictions of its workers), and Acorn Institute and New York Acorn (which were part of a complex web of interrelated entities with ACORN) -- is not comparable to congressional acts of punishment such as permanent disqualification from a certain vocation or criminalizing past conduct. *See, e.g., Brown*, 381 U.S. at 455; *Pierce v. Carskadon*, 83 U.S. 234, 21 L. Ed. 276 (1872); *Ex Parte Garland*, 71 U.S. 333, 18 L. Ed. 366 (1867); *Cummings v. Missouri*, 71 U.S. 277, 18 L. Ed. 356 (1867); *cf. Selective Serv. Sys.*, 468 U.S. at 853 (upholding law that withheld federal student assistance to men who had not registered for the draft); *Flemming*, 363 U.S. at 618-21 (upholding law that excluded certain deportees from receiving social security benefits). *Compare Am. Commc'ns Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 413-15, 70 S. Ct. 674, 94 L. Ed. 925 (1950) (rejecting bill-of-attainder challenge against a law

that required union officers to file affidavits -- that they were not Communist Party members and that they did not favor the overthrow of the United States government by force or violence -- in order to invoke the *assistance and services* of the NLRB), *with Brown*, 381 U.S. at 455 (declaring unconstitutional a law that made it a *crime* for a member of the Communist Party to serve as a union officer or manager).

Finally, we reject the plaintiffs' argument that the appropriations laws are punitive because they disqualify ACORN from federal funds even if the GAO investigation results in a favorable disposition for ACORN. Although there is no provision in the appropriations laws that ties the GAO investigation with ACORN's status to receive federal funds, Congress could, of course, modify the appropriations law following the GAO's investigation."[4] *See BellSouth Corp. v. FCC*, 162 F.3d 678, 687, 333 U.S. App. D.C. 253 (D.C. Cir. 1998) (noting that even if there were alternate ways of fulfilling legitimate government interests, "it [is] up to the legislature to make this decision"). On the facts of this case, Congress's response is not so out of proportion to its purported non-punitive

---

4. A preliminary report issued by the GAO states that "the information in this report is preliminary and subject to change. We plan to issue a report later this year with our final results related to ACORN and potentially related organizations." U.S. GOV'T ACCOUNTABILITY OFFICE, WASHINGTON, D.C., PRELIMINARY OBSERVATIONS ON FUNDING, OVERSIGHT, AND INVESTIGATIONS AND PROSECUTIONS OF ACORN OR POTENTIALLY RELATED ORGANIZATIONS (June 14, 2010), http://www.gao.gov/new.items/d10648r.pdf.

goal of protecting public funds from future fraud and waste so as to render the funding bans punitive in nature.

In sum, the plaintiffs have failed to show that the appropriations laws constitute "punishment" under the functional test.

3. Motivational Test of Punishment

The legislative record by itself is insufficient evidence for classifying a statute as a bill of attainder unless the record reflects overwhelmingly a clear legislative intent to punish. *See Flemming*, 363 U.S. at 617 ("[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute on [the] ground [of legislative history.]"); *see also Lovett*, 328 U.S. at 308-12 (recounting extensive evidence of punitive intent in the legislative record). Statements by a smattering of legislators "do not constitute [the required] unmistakable evidence of punitive intent." *Selective Serv. Sys.*, 468 U.S. at 856 n.15 (internal quotation marks omitted).

Here, as the plaintiffs argue, the legislative record reveals much concern about protecting the expenditure of taxpayer money against "waste, fraud, and abuse." 155 Cong. Rec. S9517 (daily ed. Sept. 17, 2009) (Senator Johanns); *see also* 155 Cong. Rec. S11313 (daily ed. Nov. 10, 2009). Senator Bond described the exclusion as necessary because of ACORN's "endemic and systemwide culture of fraud and abuse" and stated that Congress had "the opportunity to end this relationship now." 155 Cong. Rec. S9314 (daily ed. Sept. 14, 2009). Congressman

Issa published an eighty-eight-page staff report that concluded that ACORN and organizations associated or allied with it constituted "a criminal enterprise" that had "repeatedly and deliberately engaged in systemic fraud" and "committed a conspiracy to defraud the United States by using taxpayer funds for partisan political activities." This report was read into the Congressional Record when one of the challenged appropriation laws was introduced. *See* 155 Cong. Rec. S9308, 9309-10, 9317 (daily ed. Sept. 14, 2009) (Senator Johanns) (describing ACORN as "besieged by corruption, by fraud, and by illegal activities, -- all committed on the taxpayers' dime").

According to the plaintiffs, nearly ten members of the House of Representatives assailed ACORN as "this crooked bunch," "this corrupt and criminal organization," and being involved in "child prostitution," "shaking down lenders," "corrupting our election process," "trafficking illegal aliens," and being in the "criminal hall of fame," among other epithets and accusations. *See* 155 Cong. Rec. H9946-10129. There were also, however, representatives who opposed the exclusion of ACORN during these debates. For example, Senator Durbin stated: "[W]e are seeing in Congress an effort to punish ACORN that goes beyond any experience I can recall in the time I have been on Capitol Hill. We have put ourselves -- with some of the pending amendments -- in the position of prosecutor, judge and jury." 155 Cong. Rec. S10181, 10211 (daily ed. Oct. 7, 2009). Senator Leahy similarly protested the attack on ACORN: "Everyone -- except perhaps many of the casual observers who are the target audience of the orchestrated anti-ACORN frenzy -- knows that the score-at-any-price

partisanship is being mixed in an unseemly way with public policy." 155 Cong. Rec. S9541-42 (daily ed. Sept. 17, 2009).

Despite the evidence of punitive intent on the part of some members of Congress, unlike in *Lovett*, there is no congressional *finding* of guilt in this case. In *Lovett*, a secret trial was held by Congress to determine the guilt or innocence of the accused subversives. Upon a finding of guilt, Congress passed the law denying the accused their salary for federal service. Thus, in *Lovett*, the congressional record was "unmistakably" clear as to Congress's intent to punish the subject individuals. Here, at most, there is the "smattering" of legislators' opinions regarding ACORN's guilt of fraud. *See United States v. O'Brien*, 391 U.S. 367, 384, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it."); *cf. Selective Serv. Sys.*, 468 U.S. at 855-56 (upholding law denying federal financial assistance for higher education to male students who failed to register for the draft; in that case, as here, many legislators commented that the men who failed to register for the draft had committed a "felony, they have violated the law, and they are not entitled to these educational benefits"); *BellSouth Corp.*, 162 F.3d at 690 (sustaining provision that placed special restrictions on Bell operating companies and dismissing a "few scattered remarks referring to . . . abuses allegedly committed by [Bell operating companies] in the past" as not providing the kind of "'smoking gun' evidence of congressional vindictiveness").

To be sure, a congressional finding following a legislative trial is not the only way to establish the "unmistakable evidence" of punitive intent in the legislative record; however, here, the statements by a handful of legislators are insufficient to establish -- by themselves -- the clearest proof of punitive intent necessary for a bill of attainder. Nor is the legislative record sufficient to demonstrate "punishment" cumulatively with the historical and functional tests of punishment analyzed above.

III. CONCLUSION

In accordance with the foregoing, the judgment of the District Court is affirmed in part and vacated in part. We remand for further proceedings as to the plaintiffs' *First Amendment* and due process claims.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK FILED MARCH 10, 2010

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action NO. 09-CV-4888 (NG)

692 F. Supp. 2D 260

March 10, 2010, Decided
March 10, 2010, Filed

ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW; ACORN INSTITUTE, INC.; and MHANY MANAGEMENT, INC., f/k/a NEW YORK ACORN HOUSING COMPANY, INC.,

Plaintiffs,

v.

UNITED STATES OF AMERICA; SHAUN DONOVAN, Secretary of the Department of Housing and Urban Development; PETER ORSZAG, Director, Office of Management and Budget; TIMOTHY GEITHNER, Secretary of the Department of Treasury of the United States; LISA P. JACKSON, Administrator of the Environmental Protection Agency; GARY LOCKE, Secretary of Commerce; and ROBERT GATES, Secretary of Defense,

Defendants.

Appendix B

OPINION AND ORDER

GERSHON, United States District Judge:

Plaintiffs, the Association of Community Organizations for Reform Now, Inc. ("ACORN"), and two of its affiliates, challenge as an unconstitutional bill of attainder a group of appropriations provisions enacted by Congress that bar plaintiffs from receiving federal funding. On December 11, 2009, a preliminary injunction against the enforcement of Continuing Resolution 163, the only provision then at issue, was entered. *ACORN v. United States*, 662 F. Supp. 2d 285 (E.D.N.Y. 2009) ("ACORN I"). In an amended complaint, plaintiffs have added the remainder of the challenged 2010 appropriations provisions and have named as defendants the officials responsible for enforcing them. The parties have now agreed to consolidate plaintiffs' motions for preliminary and permanent relief and, in effect, both sides have moved for summary judgment. *See* Fed R. Civ. P. 56, 65. While there are minor disputes about factual matters, the parties agree that there are no material issues of fact that prevent resolution of this case without a trial.

As was noted in *ACORN I*, in bringing this action plaintiffs ask this court to consider the constitutionality of legislation that was approved by both houses of Congress and signed into law by the President. I again emphasize that such a task can be approached only with the utmost gravity, because legislative decisions enjoy a high presumption of legitimacy. This is particularly true where the challenge is brought under a rarely-litigated provision of the Constitution, the Bill of Attainder Clause,

which has been successfully invoked only five times in the Supreme Court since the signing of the Constitution.

ACORN's critics consider it responsible for fraud, tax evasion, and election law violations, and members of Congress have argued that precluding ACORN from federal funding is necessary to protect taxpayer money. ACORN, by contrast, while acknowledging that it has made mistakes, characterizes itself as an organization dedicated to helping the poor and argues that it has been the object of a partisan attack against its mission. This case does not involve resolution of these contrasting views. It concerns only the means Congress may use to effect its goals. Nor does this case depend upon whether Congress has the right to protect the public treasury from fraud, waste, and abuse; it unquestionably does. The question here is only whether Congress has effectuated its goals by legislatively determining ACORN's guilt and imposing punishment on ACORN in violation of the Constitution's Bill of Attainder Clause.

BACKGROUND

ACORN describes itself as "the nation's largest community organization of low-and-moderate income families." ACORN, in addition to its own work, has affiliations with a number of other organizations, including its co-plaintiffs ACORN Institute, Inc. and MHANY Management, Inc., which was formerly known as New York ACORN Housing Company, Inc. Plaintiffs have in past years received millions of dollars in federal funding from a variety of grants, embodied in contractual agreements, from various federal agencies. ACORN itself

does not receive federal grants, but it has been a frequent subcontractor of ACORN affiliates such as ACORN Institute.

Numerous accusations have been made against ACORN. Most prominently, ACORN came under attack after publication of hidden-camera videos in September of 2009, in which employees of an ACORN affiliate are seen to advise a purported prostitute and her boyfriend about how to engage in various illegal activities and evade law enforcement while doing so. Other allegations include that ACORN violated tax laws governing non-profit organizations, misused taxpayer dollars, committed voter fraud, and violated federal election laws by playing an impermissibly partisan role in its voter registration campaign. ACORN has been and is currently the subject of numerous investigations.[1] ACORN answers that it has responded by terminating staff members found to have engaged in misconduct, reorganizing its board of directors, and hiring Scott Harshbarger, Esq., a former Massachusetts Attorney General, to conduct an internal investigation. Both sides rely on Mr. Harshbarger's report, issued on December 7, 2009, which identifies problems with ACORN's internal management, discusses reforms already being undertaken, and suggests others; it also raises issues regarding the integrity of the videotapes.

---

1. The Congressional Research Service has prepared a list of all pending and previous investigations relating to ACORN. See Memorandum from Congressional Research Service to House Judiciary Committee re: Association of Community Organizations for Reform Now (Dec. 22, 2009).

Appendix B

In the fall of 2009, in the absence of 2010 appropriations acts for all federal agencies and programs, Congress enacted, and President Obama signed into law, a Continuing Appropriations Resolution ("Continuing Resolution"). That Continuing Resolution included one of the provisions at issue in this case, referred to here as "Section 163," which was the subject of *ACORN I* Continuing Appropriations Resolution, 2010, Pub. L. No. 111-68, Div. B, § 163, 123 Stat. 2023, 2053 (2009). Section 163 provides that:

> None of the funds made available by this joint resolution or any prior Act may be provided to the Association of Community Organizations for Reform Now (ACORN), or any of its affiliates, subsidiaries, or allied organizations.

The Continuing Resolution containing Section 163 went into effect on October 1, 2009, and was extended on October 31, 2009 to December 18, 2009. Further Continuing Appropriations Resolution, 2010, Pub. L. No. 111-88, Div. B, § 101, 123 Stat. 2904, 2972 (2009). The extension of the Continuing Resolution was included in the same law as the 2010 appropriations act for the "Department of the Interior, Environment, and Related Agencies." Another division of this Act prohibits federal funds from being "made available" under the Act to ACORN or "its subsidiaries." Dep't of the Interior, Environment and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, Div. A, § 427, 123 Stat 2904, 2962 (2009).

Appendix B

On October 7, 2009, Peter Orszag, the Director of the Office of Management and Budget ("OMB") and a defendant here, issued a memorandum to the heads of all executive branch agencies regarding the implementation of Section 163 ("OMB Memorandum"). The OMB Memorandum directs, *inter alia*, that "[n]o agency or department should obligate or award any Federal funds to ACORN or any of its affiliates, subsidiaries or allied organizations (collectively 'affiliates') during the period of the [Continuing Resolution]," even where the agencies had already determined that funds should be awarded to ACORN, but had not yet entered into binding agreements with the organization to do so. This prohibition applied not just to the 2010 fiscal year, but also to appropriations made in Fiscal Year 2009, and to any funds left over from prior years' appropriations. In addition, the OMB Memorandum states that agencies should, "where permissible," suspend performance and payment under existing contracts with ACORN and its affiliates, and ask for guidance on any legal considerations from the agencies' own counsel, OMB, or the Department of Justice. Finally, turning to subcontractors, the OMB Memorandum instructs agencies to "take steps so that no Federal funds are awarded or obligated by your grantees or contractors to ACORN or its affiliates" and recommends that each agency notify federal grant and contract recipients about Section 163. On November 19, 2009, HUD gave notice to plaintiff ACORN Institute that it was suspending several of its contracts with the organization because of Section 163.

Plaintiffs filed suit in this court on November 12, 2009, arguing that Section 163 is an unconstitutional bill of attainder and that it violates their rights under both

the First Amendment and the Due Process Clause. In their initial complaint, plaintiffs alleged that, as a direct consequence of Section 163, agencies have refused to review their grant applications; that grants they were told they would receive have been rescinded; that previously-awarded grants have not been renewed; and that HUD had refused to pay on its contractual obligations even for work already performed. Plaintiffs also alleged that other organizations, such as private corporations and foundations, have cut ties to them as a result of Section 163.

Following the dissemination of the OMB Memorandum, the Department of Justice Office of Legal Counsel ("OLC") responded to a request for guidance from HUD as to whether Section 163 prohibits payments to ACORN to satisfy contractual obligations that arose prior to Section 163's enactment.[2] The OLC memorandum advises HUD that "[S]ection 163 should not be read as directing or authorizing HUD to breach a pre-existing binding contractual obligation to make payments to ACORN or its affiliates, subsidiaries, or allied organizations where doing so would give rise to contractual liability." To read Section 163 otherwise, the memorandum notes, would "undo a binding governmental contractual promise." The memorandum explains that its construction of Section 163 not only avoids abrogating "binding governmental contractual promises," but also avoids constitutional concerns, in particular those arising from the Bill of Attainder Clause, that "may be presented by reading the statute, which applies to specific named entities, to

2. Although the OLC memorandum is dated October 23, 2009, it was not publicly released until late November 2009.

abrogate such contracts, including even in cases where performance has already been completed but payment has not been rendered."

Plaintiffs sought emergency relief on November 13, 2009, arguing that Section 163 was an unconstitutional bill of attainder and that it violated their rights under both the First Amendment and the Due Process Clause. On December 11, 2009, I preliminarily enjoined then-defendants the United States, Peter Orszag, in his official role as Director of OMB, Shaun Donovan, in his official role as Secretary of HUD, and Timothy Geithner, in his official role as Secretary of the Treasury, from enforcing the provision, on the grounds that plaintiffs had shown irreparable harm and a likelihood of success on the merits of their claim that Section 163 is a bill of attainder.[3] *ACORN I*, 662 F. Supp. 2d at 299-300.

On December 16, 2009, President Obama signed into law the 2010 Consolidated Appropriations Act. Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034 (2009). This Act, described by the government as a "minibus" Act, is a consolidation of various appropriations acts for Fiscal Year 2010.

---

3. The government appealed that decision on December 16, 2009, but has not moved in the Second Circuit to expedite the appeal. By letter dated February 12, 2010, the government asked for a due date of May 13, 2010 for its opening brief in the Court of Appeals, which request was "so ordered" on February 17, 2010.

Appendix B

Several of the consolidated acts contain provisions prohibiting the award of funding to ACORN.[4] Section 418 of Division A of the Act, which appropriates funding for "Transportation, Housing and Urban Development, and Related Agencies," precludes federal funding to ACORN in language identical to that of Section 163. *See* Transportation, Housing, and Urban Development, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-117, Div. A, § 418, 123 Stat. 3034, 3112 (2009).[5] Section 534 of Division B of the Act, which covers appropriations for "Commerce, Justice, Science, and Related Agencies," provides that "[n]one of the funds made available under this Act may be distributed to the Association of Community Organizations for Reform Now (ACORN) or its subsidiaries." Commerce, Justice, Science, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-117, Div. B, § 534, 123 Stat. 3034, 3157 (2009).

---

4. The government has identified three Fiscal Year 2010 appropriations acts passed shortly after Section 163 that do not include a ban on funding ACORN. *See* Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-80, 123 Stat. 2090 (2009); Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, 123 Stat 2142 (2009); Energy and Water Development and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-85, 123 Stat. 2845 (2009).

5. The parties agree that Section 418's "prior Act" language bars funding of ACORN from HUD funds left over from prior years' appropriations, but disagree as to whether that language extends to other agencies' funds from prior years. Plaintiffs and the government agree that this dispute need not be resolved to decide this case.

Appendix B

Section 511 of the "Military Construction and Veterans Affairs and Related Agencies" appropriations act provides that "[n]one of the funds made available in this division or any other division in this Act may be distributed to [ACORN] or its subsidiaries." Military Construction and Veterans Affairs and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-117, Div. E, § 511, 123 Stat 3034, 3311 (2009). In contrast to the other provisions in the minibus, which limit the funding prohibitions to one single division, the funding restriction in Division E applies to the entirety of the minibus, except insofar as it may conflict with other ACORN-related provisions within another division.

Following the enactment of the minibus bill, Congress passed and the President signed into law the final outstanding appropriations bill, the Department of Defense Appropriations Act of 2010, which prohibits distribution of funds under the act to ACORN or "its subsidiaries." Department of Defense Appropriations Act, Pub. L. No. 111-118, § 8123, 123 Stat. 3409, 3458 (2009). Once this final appropriations act was passed, the Continuing Resolution, and thus Section 163 included in it, expired.

On consent of the government, plaintiffs filed a second amended complaint including all five Fiscal Year 2010 appropriations provisions that prohibit funding to ACORN as well as Section 163.[6] Plaintiffs named three

6. Following the enactment of the 2010 appropriations acts, plaintiffs had amended their initial complaint to include challenges to these acts, and they moved to "Amend/Correct/Supplement" the preliminary injunction issued in *ACORN I*. This motion was

new defendants: Lisa P. Jackson, Administrator of the Environmental Protection Agency ("EPA"); Gary Locke, Secretary of Commerce; and Robert Gates, Secretary of Defense.

Plaintiffs and defendants agree that, for the purposes of the bill of attainder argument, the challenged provisions should be analyzed as one statute. Although several of the full year appropriations acts use language slightly different from that of Section 163, neither plaintiffs nor defendants have suggested that any of these differences is significant, either practically or legally. Similarly, although the challenged provisions differ somewhat in whether they prohibit funding to "ACORN or its subsidiaries" or "ACORN, or any of its affiliates, subsidiaries, or allied organizations," at least for plaintiffs' bill of attainder argument, any difference between these terms is immaterial. For purposes of simplicity, I refer to the group as "ACORN and its affiliates."

Plaintiffs acknowledge that HUD, pursuant to the OLC memorandum, has paid, or has agreed to pay, for work already performed under existing contracts. They contend that congressional suspension of existing contracts and the denial of the opportunity to obtain future contracts amounts to punishment that violates the Bill of Attainder Clause.

The defendants recognize that ACORN has been singled out by Congress and that there has been no judicial

---

denied on procedural grounds, after which plaintiffs, on consent, filed the second amended complaint now at issue.

trial at which ACORN has been found guilty and deserving of punishment, but argue that the challenged legislation is not a bill of attainder because it does not impose punishment. The government relies heavily on Section 535 of Division B of the 2010 Consolidated Appropriations Act, which directs the United States Government Accountability Office ("GAO") to "conduct a review and audit of the Federal funds received by [ACORN] or any subsidiary or affiliate of ACORN" to determine

> (1) whether any Federal funds were misused and, if so, the total amount of Federal funds involved and how such funds were misused; (2) what steps, if any, have been taken to recover any Federal funds that were misused; (3) what steps should be taken to prevent the misuse of any Federal funds; and (4) whether all necessary steps have been taken to prevent the misuse of any Federal funds.

Commerce, Justice, Science, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-117, Div. B, § 535, 123 Stat. 3034, 3157-58 (2009). Section 535 directs that within 180 days of enactment of the Act, the Comptroller General "shall submit to Congress a report on the results of the audit . . ., along with recommendations for Federal agency reforms." *Id.* Plaintiffs do not challenge the Section 535 provision as a bill of attainder, but the government relies on the investigation to argue that Congress had a non-punitive reason for passing the challenged provisions.

Appendix B

DISCUSSION

I. Bill of Attainder Analysis

Article I, Section 9, of the Constitution provides that "No Bill of Attainder or ex post facto Law shall be passed."[7] A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977). Enacted as a "bulwark against tyranny" by Congress, "the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature." *United States v. Brown*, 381 U.S. 437, 443, 442, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965). This principle of separation of powers animates bill of attainder jurisprudence; its prohibition "reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *Id.* at 445.[8]

---

7. The Constitution includes two clauses prohibiting bills of attainder. Article I, Section 9, implicated here, restricts Congress; Article I, Section 10, restricts state legislatures.

8. As the government acknowledges, the Second Circuit has determined that the Bill of Attainder Clauses protect corporations as well as individuals. *See Consol. Edison Co. of N.Y. v. Pataki*,

Three factors "guide a court's determination of whether a statute directed at a named or readily identifiable party is punitive": first, "whether the challenged statute falls within the historical meaning of legislative punishment"; second, "whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes," an inquiry sometimes referred to as the "functional test"; and third, "whether the legislative record evinces a legislative intent to punish." *Consol Edison Co. of N.Y., Inc. v. Pataki ("Con Ed")*, 292 F.3d 338, 350 (2d Cir. 2002) (internal quotation marks and alterations omitted). A statute "need not fit all three factors to be considered a bill of attainder; rather, those factors are the evidence that is weighed together in resolving a bill of attainder claim." *Id.*

A. *Historical Meaning of Legislative Punishment*

As the Second Circuit has explained, "[s]ome types of legislatively imposed harm . . . are considered to be punitive per se." *Con Ed*, 292 F.3d at 351. "The classic example is death, but others include imprisonment, banishment, . . . the punitive confiscation of property, and prohibition of designated individuals or groups from participation in specified employments or vocations." *Id.* (internal quotation marks and alterations omitted).[9]

---

292 F.3d 338, 346-47 (2d Cir. 2002). Defendants have reserved the right to challenge the applicability of the Bill of Attainder Clause to corporations in any appellate proceedings in this case.

9. The history of the bill of attainder, and its roots in fourteenth-century England, have been described elsewhere. *See,*

Appendix B

Any consideration of the "historical" meaning of punishment in this context must begin with the handful of Supreme Court cases finding statutes to be bills of attainder. In each of the five cases in which the Supreme Court has found legislation to violate the Bill of Attainder Clause, the context of the Court's ruling was protection of political liberty.[10] In *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 18 L. Ed. 356 (1866), for example, the Court concluded that a statute that barred persons from certain professions unless they took an oath that they had never been connected to an organization "inimical to the government of the United States" was punishment for past association with the Confederacy. *Accord Ex parte Garland*, 71 U.S. (4 Wall.) 333, 18 L. Ed. 366 (1866); *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234, 21 L. Ed. 276 (1872). Similarly, in *United States v. Brown*, 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965), the Court held that a statute making it a crime for a member of the Communist Party to serve as an officer or employee of a labor union was a bill of attainder. In the fifth case, *United States v. Lovett*, 328 U.S. 303, 66 S. Ct. 1073, 90 L. Ed. 1252, 106 Ct. Cl. 856 (1946), the Court held that a statute that permanently barred three government employees who had been accused of being communists from government service was an unconstitutional bill of attainder.

---

e.g., *Brown*, 381 U.S. at 441-49; *In re Extradition of McMullen*, 989 F.2d 603, 604-06 (2d Cir. 1993).

10. Here, plaintiffs allege that ACORN has been punished both for alleged misconduct, such as fraud, and its alleged impermissible partisanship.

Appendix B

As acknowledged in *ACORN I*, the idea that the deprivation of the opportunity to apply for discretionary federal funds is "punitive" within the meaning of the Bill of Attainder Clause at first blush seems implausible. Neither the Supreme Court nor the Second Circuit has been faced with such a claim. This is not surprising: Plaintiffs assert, and defendants do not dispute, that this is the first time Congress has denied federal funding to a specifically named person or organization in this way. One district court, however, in a case much like this one, has concluded that denial of the opportunity to apply for *state* government contracts amounts to punishment under Article I, Section 10. *See Fla. Youth Conservation Corps., Inc. v. Stutler*, No. 06-275, 2006 U.S. Dist. LEXIS 44732, 2006 WL 1835967, at *2 (N.D. Fla. June 30, 2006). For the reasons explained below, I agree with the district court in Florida and conclude that the discretionary nature of governmental funding does not foreclose a finding that Congress has impermissibly singled out plaintiffs for punishment.

Lovett is particularly instructive in this regard. In *Lovett*, a congressman attacked thirty-nine specifically named government employees, including plaintiffs, as "irresponsible, unrepresentative, crackpot, radical bureaucrats," and affiliates of "communist front organizations." *Lovett*, 328 U.S. at 308-09. Following secret hearings, Congress passed an act that no appropriation could then, or later, be used to pay plaintiffs' government salaries. *Id.* at 312-13.

The Supreme Court concluded that the appropriations act "clearly accomplishes the punishment of named

individuals without a judicial trial." *Id.* at 316. That Congress placed the prohibition in an *appropriations* bill carried no weight. "The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty," the Court concluded, "makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal." *Id.*

The government attempts to distinguish *Lovett* on the ground that plaintiffs in that case had a "vested property interest" in their jobs, whereas here, as plaintiffs unequivocally acknowledge, they have no *right* to the award of a grant or contract from the federal government. But the Court in *Lovett* did not base its decision on a property rights analysis. The Supreme Court found a deprivation amounting to punishment under the Bill of Attainder Clause, not only because plaintiffs were deprived of their earned income from existing government jobs, but also because they were deprived of any *future opportunity* to serve the government. As the Court stated, "[t]his permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type." *Id.* That plaintiffs had no right to any particular future job was of no moment.[11]

---

11. The government also argues that in *Lovett* the ban on plaintiffs' government employment was permanent, and that it was the permanency of the legislative action that made the statute unconstitutional. But, as I address at length below, the year-long duration of the ban does not foreclose a bill of attainder finding, particularly given that even a short deprivation of the opportunity to apply for or receive federal funding has long-term ramifications for plaintiffs.

Appendix B

The government relies on two Supreme Court cases to argue that the denial of the opportunity to apply for federal funding cannot be punishment. In *Flemming v. Nestor*, 363 U.S. 603, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960), the plaintiff argued that a statute denying Social Security benefits to a category of deported aliens was a bill of attainder. The Supreme Court disagreed, describing the deprivation as the "mere denial of a noncontractual government benefit" and finding no punitive intent in the design of the statute. *Id.* at 617. The government also points to *Selective Service System v. Minnesota Public Interest Research Group ("Selective Service")*, 468 U.S. 841, 853, 104 S. Ct. 3348, 82 L. Ed. 2d 632 (1984), where the Court concluded that a statute barring persons who had not registered for the draft from federal student aid did not constitute punishment.

This case is closer to *Lovett* than to *Flemming* or *Selective Service*. The Supreme Court in both *Flemming* and *Selective Service* found the statutes at issue to be nonpunitive. In *Flemming*, the Court concluded that the legislative record "falls short of any persuasive showing that Congress was in fact concerned alone with the grounds of deportation," which, in the plaintiff's case, was prior membership in the Communist party. *Flemming*, 363 U.S. at 619. In *Selective Service*, the Court reasoned that the statute had the valid goal of encouraging a class of persons to do what they were already legally obligated to do—register for the draft. *See Selective Service*, 468 U.S. at 860. As discussed further below, I cannot discern any valid, non-punitive purpose for Congress enacting the legislation challenged in this case. Further, unlike

the plaintiffs affected by the statute at issue in *Selective Service*, plaintiffs here cannot avoid the restrictions imposed upon them. Nothing in the challenged provisions affords plaintiffs an opportunity to overcome the funding ban. *Cf. SBC Commc'ns, Inc. v. FCC*, 154 F.3d 226, 243 (5th Cir. 1998) (upholding against a bill of attainder challenge a statute that sought to encourage competition in the telecommunications industry by imposing restrictions on a specific group of companies because, *inter alia*, the companies "[would] be allowed to enter each of the affected areas as soon as the statutory criteria regarding competition in their local service markets are met").

Notably, in neither *Flemming* nor *Selective Service* did Congress single out any particular individual or entity for adverse treatment; rather, each statute applied to an entire category of people. Here, in contrast, the congressional deprivation is imposed only on ACORN and its affiliates. *See Flemming*, 363 U.S. at 619 (reasoning that, even if the legislative history were read "as evidencing Congress' concern with the grounds [of prior Communist party membership], rather than the fact, of deportation," "[t]his would still be a far cry from the situations involved in [prior Supreme Court cases] where the legislation was on its face aimed at particular individuals"); *Nixon*, 433 U.S. at 485 (Stevens, J. concurring) (stating that "[i]t has been held permissible for Congress to deprive Communist deportees, as a group, of their social security benefits, but it would surely be a bill of attainder for Congress to deprive a single, named individual of the same benefit. . . . The very specificity would mark it as punishment, for there is rarely any valid reason for such narrow legislation[.]").

Accordingly, a close reading of the cases indicates that a deprivation of the opportunity to apply for funding in fact fits comfortably within the definition of "punishment" for bill of attainder purposes.

B. *The Functional Test*

I next consider whether the challenged provisions further non-punitive legislative purposes in light of the type and severity of the burdens they impose.

The Court of Appeals for the Second Circuit explored this factor at length in *Consolidated Edison of New York, Inc. v. Pataki*, in which the Court concluded that an act of the New York state legislature constituted an unconstitutional bill of attainder under Article I, Section 10 of the Constitution. 292 F.3d at 345. Based on a finding that Consolidated Edison ("Con Ed") had "failed to exercise reasonable care on behalf of the health, safety and economic interests of its customers," when it failed to promptly replace steam generators it knew to be faulty, and which then failed, the New York legislature passed a law forbidding Con Ed from passing along the costs associated with the outage to the ratepayers. *Id.* at 344-45.

The Second Circuit found that the State had no valid non-punitive reason that justified singling out Con Ed. It rejected the State's argument that the statute had the legitimate non-punitive purpose of preventing innocent ratepayers from paying for Con Ed's mistakes. The statute, the Court concluded, did more than simply re-distribute or minimize costs. Rather, the "type and

severity of the burdens imposed" belied the legitimacy of the regulatory justification. *Id.* at 353. There was little question that Con Ed could have passed on the cost of obtaining power elsewhere if it had replaced the generators during a *scheduled* outage; "[w]hat then," the Court asked, "other than punishment can justify forcing Con Ed to absorb these same costs after the accidental outage?" *Id.* Further, the legislature could have enacted "less burdensome alternatives" to achieve its legitimate objectives, such as excluding "those substantial costs that would have been incurred absent misconduct on Con Ed's part." *Id.* at 354.

In attempting to articulate a non-punitive rationale for the challenged provisions, the government now presses the same non-punitive justifications as it did in *ACORN I*. The government again argues that, because there was no formal congressional finding of misconduct against ACORN, the year-long bar on all funding to ACORN is not punitive. But, as in *Con Ed*, the nature of the bar and the context within which it occurred make it unmistakable that Congress determined ACORN's guilt before defunding it. *See Nixon*, 433 U.S. at 480 (noting that a "formal legislative announcement of moral blameworthiness or punishment" is not a necessary element of a bill of attainder). In sum, wholly apart from the vociferous comments by various members of Congress as to ACORN's criminality and fraud, as described below, no reasonable observer could suppose that such severe action would have been taken in the absence of a conclusion that misconduct had occurred. *See Con Ed*, 292 F.3d at 349 (noting that "[a]nother indispensible element of a

bill of attainder is its retrospective focus: it defines past conduct as wrongdoing and then imposes punishment on that past conduct.").

The government also argues that Congress withheld funds from plaintiffs for the non-punitive reason of protecting "the public fisc," not to penalize ACORN for past wrongdoing. But Congress's interest in preventing *future* misconduct does not render the statute regulatory rather man punitive. Deterring future misconduct, as *Con Ed* stressed, is a traditional justification of punishment *See Con Ed*, 292 F.3d at 353; *see also Brown*, 381 U.S. at 458; *Selective Service*, 468 U.S. at 851-52 ("Punishment is not limited solely to retribution for past events, but may involve deprivations inflicted to deter future misconduct."). Incapacitation, too, is often a reason for punishment But *cf. SeaRiver Maritime Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662 (9th Cir. 2002) (upholding a statute restricting "tank vessels that have spilled more than 1,000,000 gallons of oil into the marine environment" from operating in Prince William Sound against a bill of attainder challenge because the statute had a non-punitive purpose.).

Turning to consideration of the "type and severity" of the burdens the challenged provisions impose, the government argues that the appropriations provisions, unlike the "permanent" ban on funding in *Lovett*, are only "temporary." But the year-long duration of the ban does not foreclose a bill of attainder finding. As a preliminary matter, it is far from settled that punishment must be a permanent measure. *See Brown*, 381 U.S. at 447 (noting that the Bill of Attainder clause bars legislative punishment

"of any form or severity"). If Congress determined that a person was to be jailed for a year and then released, the government would be hard pressed to argue that only a life sentence would constitute "punishment."[12]

And, contrary to the government's contention, the challenged provisions are no less permanent than the statute at issue in *Con Ed*. The New York legislature deprived Con Ed of the opportunity to recover the costs of its outage through a one-time rate increase, but Con Ed was not precluded from recovering costs of *future* outages from ratepayers. In the same way, the ban on ACORN may last only one year, but ACORN is permanently deprived of the opportunity to apply for Fiscal Year 2010 funding. This may affect multi-year grants and contracts (although such grants and contracts may be contingent on congressional appropriations in another fiscal year). In addition, the backward-looking provision in the HUD appropriations act, imposing limits on funding ACORN out of available appropriations from prior acts, also extends the impact beyond a single appropriations year. *See supra* note 5. Most importantly, although the government's brief

12. The government's argument also ignores the fact that appropriations acts, even if renewed indefinitely, are by their very nature limited in time; if plaintiffs are precluded from challenging a funding restriction on the basis of the "temporariness" of a year-long appropriations provision, plaintiffs could never challenge a ban in an appropriations bill that was renewed indefinitely. Such a situation would raise difficulties akin to those controversies the Supreme Court has found "capable of repetition, yet evading review" in the mootness context. *See, e.g., Davis v. Fed. Election Comm'n*, 128 S. Ct. 2759, 2769-70, 171 L. Ed. 2d 737 (2008).

refers to the limitations as "temporary," as "suspensions of funding," and as a "moratorium" on funding, plaintiffs are permanently harmed now even if their opportunity to apply for federal funding is restored in the future.

One difference between Section 163 and the newly-challenged provisions features prominently in one of the government's proffered non-punitive rationales: the inclusion in Section 535 of a directive to GAO to investigate grants to ACORN. Citing this investigation, the government argues mat the challenged provisions "further the non-punitive legislative purposes of investigating the possible misuse of federal funds and exercising oversight of executive branch agencies' expenditure of funds." Gov't's Mem. in Opp. to Pls.' Motion for Perm. Relief 15. The government points to the investigation as evidence that Congress's rationale in enacting these various provisions was not to punish plaintiffs, but rather to learn about their activities to be able to determine whether to fund them in the 2011 appropriations year.

This argument rests on the faulty assumption that Congress can constitutionally rely on the results of a congressional investigation to single plaintiffs out and to deny them funding. Congress is entitled to investigate ACORN and to determine whether the executive agencies with whom plaintiffs have contracted have properly held them to account. But Congress could not rely on the negative results of a congressional or executive report as a rationale to impose a broad, punitive funding ban on a specific, named organization; explicit non-judicial findings of guilt would exacerbate, rather than mitigate,

the punitive nature of the challenged provisions. *See De Veau v. Braisted*, 363 U.S. 144, 160, 80 S. Ct. 1146, 4 L. Ed. 2d 1109 (1960) ("The distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt"). The same is true for the variety of investigations of ACORN the government relies on to justify Congress's action. Similarly, legislative determinations of plaintiffs' wrongdoing did not save the statutes in *Lovett* or *Con Ed.*

In any event, the inclusion of a direction to the GAO to investigate does not support the plausibility of the government's rationale. To the extent the government argues that the investigation evidences Congress's non-punitive purpose of investigating the possible misuse of federal funds, nothing in the challenged legislation, or in Section 535, indicates that the investigation ordered by Congress is linked to the bans on funding in the way that government counsel suggests. Nor does anything in the legislative record support this rationale; the government has cited no legislator who articulated it;[13] and in fact, the

13. The government notes that two members of the House, Representative Lamar Smith and Representative Darrell Issa, wrote a letter to the GAO requesting an investigation into ACORN's use of federal funds, as did twenty senators. *See, e.g.*, Letter from Congressmen Smith and Issa to The Honorable Gene Dodaro, Acting Comptroller General (Sept. 23, 2009); Letter from Twenty Senators to Acting Comptroller General Dodaro (Sept. 22, 2009).

But, as plaintiffs point out, Representatives Smith and Issa wrote their letter only after they had voted to prohibit ACORN from receiving federal funds on a *permanent* basis. *See* Defund

proponent of the investigation, Senator Richard Durbin, argued *against* the funding prohibitions.[14] Further, as noted previously, the unavailability of any means for ACORN to overcome the funding ban if the investigation report is favorable underscores the lack of a connection between the burdens of the statute and Congress's purpose in enacting it.

ACORN Act, H.R. 3571, 111th Congress (passed in the House September 17, 2009). Moreover, several of the senators requesting an investigation had previously introduced Senate Bill 1687, the Protect Taxpayers from ACORN Act, sponsored by Senator Mike Johanns, which would also have permanently prohibited ACORN and ACORN affiliates from receiving any federal funding. And, indeed, the same members of Congress voted for the funding prohibition in the Department of Interior's appropriations act before they knew whether the GAO would investigate at all.

14. In proposing the investigation, Senator Durbin stated that "[W]e are seeing in Congress an effort to punish ACORN that goes beyond any experience I can recall in the time I have been on Capitol Hill. We have put ourselves -- with some of the pending amendments -- in the position of prosecutor, judge and jury." 155 Cong. Rec. S10181, S10211 (daily ed. Oct. 7, 2009). He continued:

> Mr. President, I went to one of these old-fashioned law schools. We believed that first you have the trial, then you have the hanging. But, unfortunately, when it comes to this organization, there has been a summary execution order issued before the trial. I think that is wrong. In America, you have a trial before a hanging, no matter how guilty the party may appear. And you don't necessarily penalize an entire organization because of the sins or crimes of a limited number of employees. First, we should find out the facts. *Id.*

Moreover, the government ignores the existence of comprehensive regulations promulgated to address the very concerns Congress has expressed about ACORN. For example, the Code of Federal Regulations establishes a formal process for determining when federal contractors can be suspended or debarred. *See, e.g.*, 2 C.F.R. Ch. 1, Part 180. Subpart G of this part provides that a suspending official may impose suspension after considering a range of factors; the official can even take "immediate action" if "needed to protect the public interest." *See* 2 C.F.R. § 180.705 ("In deciding whether immediate action is needed to protect the public interest, the suspending official has wide discretion . . . ."). By noting these regulations, I do not suggest that Congress is precluded from exercising its oversight powers if it is concerned that agencies are not adequately implementing their authority. But the existence of these regulations militates against the need for draconian, emergency action by Congress.

That ACORN alone was singled out for adverse treatment further belies any claim mat non-punitive reasons explain the challenged provisions. It is true that not every statute directed at a single individual or entity will necessarily be a bill of attainder. In *Nixon*, for example, the Supreme Court found that a statute naming former President Nixon was not a bill of attainder. The specific mention of his name was "easily explained by the fact that at the time of the Act's passage, only his [papers and recordings] demanded immediate attention." 433 U.S. at 472. Nixon, and only Nixon, had entered into an agreement with a depository which called for destruction of the materials upon Nixon's death. Thus,

Nixon "constituted a legitimate class of one, and this provide[d] a basis for Congress' decision to proceed with dispatch with respect to his materials while accepting the status of his predecessors' papers and ordering the further consideration of generalized standards to govern his successors." *Id.*

Similarly, the D.C. Circuit in *BellSouth Corp. v. FCC*, 162 F.3d 678, 679, 333 U.S. App. D.C. 253 (D.C. Cir. 1998), held that a statute that specifically restricted the operations of the Bell Operating Companies ("BOCs") in order to promote competition in the telecommunications market was not a bill of attainder because of the "unique infrastructure controlled by the BOCs" which allowed them to exercise monopoly power. Because of this "unique infrastructure," the D.C. Circuit concluded that the differential treatment was "neither suggestive of punitive purpose nor particularly suspicious." *Id.* ` (internal quotation marks omitted). The Fifth Circuit, addressing another challenge to the same legislation, similarly stated that the "[BOCs] can exercise bottleneck control over both ends of a [long distance] telephone call in a higher fraction of cases" than other companies, and that it was therefore "rational to subject them to additional burdens in order to achieve the overall goal of competitive local and long distance service." *See SBC Commc'ns Inc.*, 154 F.3d at 243.

The government has offered no similarly unique reason to treat ACORN differently from other contractors accused of serious misconduct and to bar ACORN from federal funding without either a judicial trial or the administrative process applicable to all other government

contractors. In *Con Ed*, the Second Circuit established a rigorous standard for evaluating legislatures' purported justifications in the bill of attainder context New York State argued numerous seemingly non-punitive reasons for the legislation in question, including deterrence and protection of public safety. The Circuit examined each rationale closely and systematically, and it found each one lacking a non-punitive purpose. As in *Con Ed*, none of the government's justifications stand up to scrutiny. I can discern no non-punitive rationale for a congressional ban on plaintiffs, and plaintiffs alone, from federal funding.

C. *Legislative History*

The third, and final, element in determining whether an act is punitive is legislative intent. *See Selective Service*, 468 U.S. at 852. "The legislative record by itself is insufficient evidence for classifying a statute as a bill of attainder unless the record reflects overwhelmingly a clear legislative intent to punish." *Con Ed*, 292 F.3d at 354. Determining Congress's intent is often a difficult exercise; the stated comments of one legislator do not necessarily represent the unspoken thoughts of others who voted for a bill. Nevertheless, since the Supreme Court instructs that legislative intent is a key part of the framework for determining whether a legislative act is a bill of attainder, I must consider it. *See Nixon*, 433 U.S. at 478.

Here, the task is made easier because the government fails to offer any legislative history that would indicate a non-punitive intent In *ACORN I*, in justifying Section 163, the government relied on the statements of Senator

Mike Johanns, who introduced all of the challenged provisions in this case. For example, the government cited Senator Johanns's statement, in support of the provision defending ACORN in the 2010 Department of Interior's appropriations act, that he was proposing the legislation "to defend taxpayers against waste, fraud, and abuse." 155 Cong. Rec. S9517 (daily ed. Sept. 17, 2009). The government also relied on Senator Johanns's statement that ACORN was "in an absolute free fall when it comes to allegations of illegal activity" and was "besieged by allegations of fraud and corruption and employee wrongdoing." *Id.* Such statements require an implicit finding of wrongdoing by plaintiffs; protection of taxpayers' money is a logical justification for a funding ban only if wrongdoing is assumed.[15]

When introducing the challenged 2010 appropriations provisions, Senator Johanns made it clear that the purpose of the new provisions was to continue the prohibition enacted in Section 163. He explained that, because the Continuing Resolution was about to expire, Congress

---

15. At least one representative, Representative Rush Holt, voiced his concern that Section 163 was a bill of attainder. *See* 115 Cong. Rec. H9975 (daily ed. Sept. 25, 2009). In his comments, Rep. Holt referenced a report from the Congressional Research Service. This report, which was written regarding a different bill, "the Defund ACORN Act," which has not been enacted, analyzed that bill and concluded that "a court would have a sufficient basis to overcome the presumption of constitutionality and find that the Defund ACORN Act violates the prohibition against bills of attainder." Kenneth Thomas, Congressional Research Service Report for Congress: The Proposed "Defund ACORN Act": Is it a "Bill of Attainder"? (Sept. 22, 2009).

"need[s] to continue passing this amendment; therefore, [he] need[s] to continue to offer it." Senator Johanns also noted that he "do[es] have a piece of legislation pending that would take care of this across the Federal system, but that has not come to a vote yet. So I am offering today this amendment on ACORN. This amendment will continue to protect taxpayer dollars." 155 Cong. Rec. S11313 (daily ed. Nov. 10, 2009); *see also* 155 Cong. Rec. S9317 (daily ed. Sept. 14, 2009) (statement of Sen. Johanns) ("Somebody has to go after ACORN. Madam President, I suggest this afternoon that 'somebody' is each and every Member of the Senate.").

Statements by other legislators echoed the punitive purpose of the legislation. *See, e.g.*, 155 Cong. Rec. S9314 (daily ed. Sept. 14, 2009) (statement of Sen. Kit Bond) (stating that ACORN's problem is not one of "a handful of rogue employees, but, regrettably, an endemic systemwide culture of fraud and abuse" and that "Congress has the opportunity to end this relationship now"). In addition, the staff of Representative Darrell Issa authored an 88-page report entitled "Is ACORN Intentionally Structured as a Criminal Enterprise?", which states that "ACORN has repeatedly and deliberately engaged in systemic fraud" and accuses ACORN of conspiring to use taxpayer funds for partisan purposes.[16] The government correctly

16. With respect to plaintiffs' allegations that the challenged provisions are intended to punish ACORN for its impermissible partisanship, a statement Representative Issa made in response to OLC's October 23, 2009 memorandum construing the scope of Section 163 is noteworthy. In that statement, Representative Issa accused OLC of "old-fashioned cronyism" and stated that

notes that the Issa Report was authored solely by Representative Issa's office and was not commissioned by Congress. Nevertheless, because Senator Johanns himself requested that its executive summary be entered into the congressional record, the Issa Report is relevant to this inquiry. *See* 155 Cong. Rec. S9309 (daily ed. Sept. 14, 2009) (statement of Sen. Johanns introducing Issa Report in support of what would become Section 418 of the HUD appropriations bill).

Without more, the legislative history would not be enough to render the legislation a bill of attainder. But these statements underline the punitive nature of the legislation. *See Con Ed*, 292 F.3d at 355 ("[T]he stated intent of at least some legislators—most notably one of the floor managers of the legislation—to punish Con Ed reinforces our independent conclusion that a substantial part of the legislation cannot be justified by any legislative purpose but punishment.").

The Supreme Court counseled in *Flemming* that each attainder case "turn[s] on its own highly particularized context." *Flemming*, 363 U.S. at 616. Here, as in *Lovett*, Congress deprived plaintiffs of an opportunity available to all others. Especially where plaintiffs have received federal funds from many federal grants and contracts over the years, it cannot be said that such deprivation is

---

"[t]axpayers should not have to continue subsidizing a criminal enterprise that helped Barack Obama get elected President." Press Release, Rep. Darrell Issa, Issa Blasts Administrative Decision to Fund ACORN—Reeks of Political Cronyism (Nov. 27, 2009).

anything short of punishment as that has been understood in the bill of attainder cases. The challenged provisions, by singling out ACORN and its affiliates for severe, sweeping restrictions, constitute punishment under the three factors the Supreme Court has articulated for making this determination.[17]

II. Remedies

A. *Standing/Remedies As To Certain Defendants*

Before considering particular remedies, I address the government's arguments that the court lacks jurisdiction to award any remedy against certain defendants. The government relies on Article III's case-or-controversy requirement, which limits federal jurisdiction to actual, ongoing controversies between the parties. *See Northwestern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 663, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993). The government does not challenge plaintiffs' standing against the United States and the Secretary of HUD, but raises issues as to the remaining defendants.

In essence, the government claims that plaintiffs have no standing as to two categories of named defendants. The first category of defendants consists of the heads of three of the government departments/agencies whose

---

17. Because I find the challenged provisions unconstitutional under the Bill of Attainder Clause, I do not reach plaintiffs' claims under the First Amendment and the Due Process Clause.

funds ACORN is barred from receiving: the Department of Defense, the EPA, and the Department of Commerce. The government contends that plaintiffs cannot point to any funding they might receive from these three that is affected by the challenged provisions. The second category is comprised of the heads of OMB and the Department of the Treasury, because, the government contends, neither enforces the restrictions on funding.

i. Department of Defense, EPA, and Department of Commerce

The challenged provisions include bans on funding from the Defense Department, the EPA, and the Commerce Department. It is not disputed that plaintiffs have received funding from the EPA, either directly or indirectly, and that they have an interest in future funding from both the EPA and Commerce. The defendants simply argue that ACORN cannot identify a specific grant from the EPA or Commerce that ACORN is being deprived of at the moment; plaintiffs dispute this contention, but the parties' disagreements as to the particulars of a few specific grant opportunities are immaterial. There is no dispute that the funding prohibitions bar ACORN and its affiliates from obtaining federal funding either directly from a grant, or indirectly as a subcontractor, from the EPA or the Commerce Department Plaintiffs have never sought funding from the Department of Defense and agree that they have no expectation of seeking funding from that Department.

But even where there is no *direct* economic injury, reputational injury, as the government acknowledges, can

be an injury-in-fact for standing purposes. In *Gully v. National Credit Union Administration Board*, 341 F.3d 155, 162 (2d Cir. 2003), for example, the Second Circuit concluded that the plaintiff had standing to challenge a ruling of misconduct, even though the reprimand was not accompanied by a suspension of any kind, because "[i]t is self-evident that Gully's reputation will be blackened by the Board's finding of misconduct and unfitness." *Id.* Similarly, in *Foretich v. United States*, 351 F.3d 1198, 359 U.S. App. D.C. 54 (D.C. Cir. 2003), the D.C. Circuit considered whether a plaintiff could challenge as a bill of attainder a statute that deprived him of his child visitation rights, even though his child was eighteen, and the statute no longer had any practical effect on his right to see her. The D.C. Circuit concluded that his reputational injuries formed the basis for standing, reasoning that "Congress's act of judging Dr. Foretich and legislating against him on the basis of that judgment—the very things that, as we will see, render the Act an unconstitutional bill of attainder—directly give rise to a cognizable injury to his reputation . . . ." *Id.* at 1213.

The primary argument the government makes in opposition to reputational standing in this case is that plaintiffs' own highly publicized misdeeds, and not the challenged provisions, were the cause of any reputational harms, and that, consequently, judicial relief would not remedy the damage. In *Foretich*, the D.C. Circuit rejected that argument for reasons equally applicable to this case. The court acknowledged that "[i]t may be true . . . that the damage to Dr. Foretich's reputation comes in part from the publicity surrounding the custody dispute and

[his ex-wife's] allegations, not solely from the [challenged statute]." But

> [T]his misses the point The Act itself has caused significant harm to Dr. Foretich. Therefore, by vindicating Dr. Foretich's assertion that Congress unfairly and unlawfully rendered a judgment as to his character and fitness as a father, declaratory relief will provide a significant measure of redress sufficient to satisfy the requirements of Article III standing. Here, a decision declaring the Act unlawful would make clear that Congress was wrong to pass judgment on Dr. Foretich and wrong to single him out for punishment on the basis of that judgment.

Id. at 1216. Similarly, in *Gully*, the Second Circuit characterized as "facile" the government's argument that the reprimand itself had not caused plaintiff's injuries. There, the Circuit wrote that "[i]t is the Board's *determination*, not Gully's reprehensible conduct, that has sullied her reputation in the credit union industry . . . ." *Gully*, 341 F.3d at 162.

The same reasoning applies here; plaintiffs have suffered from the congressional determination of plaintiffs' guilt, and relief in this action "would make clear that Congress was wrong to pass judgment on [plaintiffs] and wrong to single [them] out for punishment on the basis of that judgment." *Foretich*, 351 F.3d at 1216. Moreover, the record establishes that the reputational injury has an

economic component. The challenged legislation has not only barred ACORN from federal funding but has also affected ACORN's ability to obtain funding from non-governmental entities fearful of being tainted—because of the legislation—as an affiliate of ACORN. Accordingly, even apart from plaintiffs' direct economic injuries, their reputational injuries provide an independent basis not only for standing against all of the defendants, but also for relief against them.

ii. OMB and the Department of the Treasury

The government asserts that the Director of OMB and the Secretary of the Treasury are not properly-named defendants on the ground that neither enforces the challenged provisions. This argument takes too narrow a view of these agencies' roles in the federal appropriations process. OMB's acknowledged practice is to notify agencies of recently-enacted provisions of broad importance, as illustrated by OMB's issuance of a memorandum after Section 163 was passed. Because that memorandum is one of the primary sources of plaintiffs' reputational harms, and considering OMB's continuing responsibility to explain appropriations provisions to agencies, plaintiffs have sufficiently alleged an injury-in-fact to support standing against the OMB's Director. As for the Treasury Department, it is responsible for disbursing federal funds, which "may not be disbursed or drawn down from the treasury of the United States unless authorized in accordance with an appropriation act." Decl. of Rita Bratcher, Gov't's Mem. of Law in Opp. to Mot. for Perm. Relief, Ex. B. Although the certifying

officials of grant-making agencies may have the primary role in determining whether a disbursement is authorized, the plain language of the challenged provisions prohibits the Treasury Department as the disbursing agency from "providing" or "distributing" funds to ACORN, and provides a basis for standing against the Secretary of the Treasury.

Both OMB and the Department of the Treasury therefore play key roles in administering the appropriations process, and the government has offered no sound reason not to include all agencies that participate in enforcing the unconstitutional provisions. In fact, when enjoining the United States, the court is required to name all officials responsible for compliance with the injunction. Here that includes the Director of OMB and the Secretary of the Treasury. *See* 5 U.S.C. § 702 ("The United States may be named as a defendant in [a challenge to agency action or inaction seeking relief other than monetary damages], and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance.").

B. *Availability of Permanent Relief Against Section 163*

Because Section 163 has now expired, the government argues that a judgment that Section 163 is unconstitutional would not offer plaintiffs any relief. The expiration of the Continuing Resolution, however, did not end Section 163's impact on plaintiffs. As described above, OMB sent

a memo to every federal agency in Section 163's wake, informing the agencies that Congress had cut off funding to plaintiffs, and directing them to inform their grantees, and their grantees' subcontractors, of the funding ban on plaintiffs. The reach of this memo was broad, and its effect, lasting. For example, the EPA sent an email to nearly all EPA financial assistance recipients and procurement contractors informing them of the broad scope of the funding prohibitions. Following *ACORN I*, OMB did send an email to all federal agencies' general counsels informing them of the injunction entered in *ACORN I* and that the government was considering appeal, but OMB did not direct them to inform their agencies, grantees, and grantees' subcontractors of this court's ruling. The reputational harm, therefore, continues, as the original advice from OMB to the hundreds, if not thousands, of recipients of that advice has never been rescinded.[18]

---

18. The government has separately moved to vacate the December 11, 2009 Injunction and Order, referred to in this opinion as *ACORN I*, on the ground that the preliminary injunction became moot before the government had the opportunity to appeal. The government takes the position that the subject of the decision, Section 163 of the Continuing Resolution, was "without effect" through "happenstance" as the Continuing Resolution had expired on its own terms on December 18, 2009.

The government's motion to vacate is denied. As described in the text, the expiration of the Continuing Resolution did not end Section 163's impact on plaintiffs. In *ACORN I*, as here, I concluded that Congress made a determination of plaintiffs' guilt in its enactment of Section 163. Like Dr. Foretich, discussed above, plaintiffs suffered a reputational injury that continues regardless of whether Section 163 continues to cut off any funds to plaintiffs. For that reason, plaintiffs' claims relating to Section 163 survive its

C. Declaratory and Injunctive Relief

The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought:" 28 U.S.C. § 2201; *see also* Fed. R. Civ. P. 57. For the reasons explained above, I now direct entry of a declaratory judgment that the challenged provisions are unconstitutional because they violate the Bill of Attainder Clause.

In addition to the declaratory judgment, plaintiffs seek a permanent injunction to undo the damage the challenged provisions are causing. "To obtain a permanent injunction, a plaintiff must succeed on the merits and show the absence of an adequate remedy at law and irreparable harm if the relief is not granted." *Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006) (internal quotation marks omitted). Plaintiffs have prevailed on their bill of attainder claim. As for irreparable harm, it is undisputed that prior to the funding ban, plaintiffs had received significant amounts of federal funding, either directly or indirectly as subcontractors; that grants with the government have been suspended; and that they cannot receive renewals or new grants under the challenged legislation.[19] Because

---

expiration, and there is no basis for vacating *ACORN I* as moot. Of course, the relief to be entered today will supersede the decision in *ACORN I*, which was limited to preliminary relief.

19. Only because of the OLC Memo of October 23, 2009, described above, which raised the possibility of a bill of attainder

the government's sovereign immunity prevents plaintiffs from bringing suit against the government for monetary damages for these injuries, these harms are, by definition, irreparable.

Putting aside the role of sovereign immunity in barring the recovery of damages in this case, and any other limitations on the recovery of damages by government contractors where sovereign immunity has been waived, the amount of money plaintiffs might have been awarded had they been allowed to compete for contracts is, as the government acknowledges, impossible to calculate. *See Lion Raisins, Inc. v. United States*, 52 Fed. Cl. 115, 119-20 (Fed. Cl. 2002) (noting that injunctive relief is "the most common remedy" for a contractor wrongfully suspended from bidding on government contracts, and that "the specter of lost profits often constitutes the irreparable harm upon which injunctive relief is based"). Even in non-constitutional cases that involve suspension or debarment from federal contracting, courts have granted injunctive relief where money damages will not be available and where the contractor has made a sufficient showing on the merits of its claim. *See, e.g., Alf v. Donley*, 666 F. Supp. 2d 60, 70 (D.D.C. 2009) (taking into account the plaintiff's inability to recoup lost income because of sovereign immunity as a factor in finding irreparable harm). A finding of significant violation of constitutional rights also supports the finding of irreparable harm. *See Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) ("When an alleged deprivation of a constitutional right is involved,

---

issue if they were not paid, were plaintiffs paid on the suspended contracts for work they had already performed.

most courts hold that no further showing of irreparable injury is necessary."); *see also* 11A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice and Procedure § 2948.1 (2d ed. 2009) (same).

In addition to their irreparable economic harms, plaintiffs have also established reputational injuries for which they can never recover damages at law from the defendants. All of these injuries may continue in the absence of injunctive relief from this court. In determining the nature of the injunctive relief to be awarded, I have considered the acknowledged role of OMB in explaining appropriations provisions to federal agencies, as exemplified by its issuance of the Section 163 memorandum. To date OMB has not rescinded that memorandum. Therefore, injunctive relief will issue to assure that, so far as possible, the harms caused by the unconstitutional legislation will be undone.

CONCLUSION

Plaintiffs have prevailed on their bill of attainder claim. They have also established irreparable harm and the need for both declaratory and injunctive relief. Therefore plaintiffs' motion for declaratory relief and a permanent injunction is GRANTED. The government's "cross-motion to dismiss and for summary judgment" is DENIED. The government's motion to vacate *ACORN I* is DENIED.

A judgment in the following form shall issue:

It is hereby

Appendix B

DECLARED that, pursuant to Article I, Section 9, of the United States Constitution, the following Acts of Congress are unconstitutional: The Continuing Appropriations Resolution, 2010, Public Law 111-68, Division B, Section 163; the Department of the Interior, Environment, and Related Agencies Appropriations Act of 2010, Public Law 111-88, Division A, Section 427; Consolidated Appropriations Act of 2010, Public Law 111-117, Division A, Section 418; Consolidated Appropriations Act of 2010, Public Law 111-117, Division B, Section 534; Consolidated Appropriations Act of 2010, Public Law 111-117, Division E, Section 511; and the Department of Defense Appropriations Act of 2010, Public Law 111-118, Division A, Section 8123.

An injunction in the following form shall issue:

Defendants the UNITED STATES OF AMERICA; SHAUN DONOVAN, in his official capacity as Secretary of the Department of Housing and Urban Development; PETER ORSZAG, in his official capacity as Director of the Office of Management and Budget; TIMOTHY GEITHNER, in his official capacity as Secretary of the Department of Treasury of the United States; LISA P. JACKSON, in her official capacity as Administrator of the Environmental Protection Agency; GARY LOCKE, in his official capacity as Secretary

of Commerce; and ROBERT GATES, in his official capacity as Secretary of Defense; and all those acting in concert with them, are hereby permanently

ENJOINED from enforcing the Department of the Interior, Environment, and Related Agencies Appropriations Act of 2010, Public Law 111-88, Division A, Section 427; Consolidated Appropriations Act of 2010, Public Law 111-117, Division A, Section 418; Consolidated Appropriations Act of 2010, Public Law 111-117, Division B, Section 534; Consolidated Appropriations Act of 2010, Public Law 111-117, Division E, Section 511; and the Department of Defense Appropriations Act of 2010, Public Law 111-118, Division A, Section 8123; and

Defendant PETER ORSZAG, in his official capacity as Director of the Office of Management and Budget, is hereby permanently

(1) ENJOINED from instructing or advising federal agencies to enforce any of the legislative provisions declared unconstitutional by this court;

(2) ENJOINED to officially rescind the October 7, 2009 OMB memorandum entitled "Memorandum for the Heads of Executive Departments and Agencies" providing "[g]uidance

on [S]ection 163 of the Continuing Resolution regarding the Association of Community Organizations for Reform Now (ACORN)" ("the OMB Memorandum");

(3) ENJOINED (a) to advise all federal agencies to whom he or his agents sent the OMB Memorandum that the legislative provisions which are the subject of this injunction have been declared unconstitutional; and (b) to instruct all federal agencies that they should advise their contractors or grantees that those legislative provisions have been declared unconstitutional by this court.

SO ORDERED.

[signature]

NINA GERSHON

United States District Judge
Dated: March 10, 2010
Brooklyn, New York

APPENDIX C —OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DECIDED DECEMBER 11, 2009

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No. 09-cv-4888 (NG)

Decided: December 11, 2009

ACORN; ACORN INSTITUTE, INC.; and NEW YORK ACORN HOUSING COMPANY, INC.,

Plaintiffs,

v.

UNITED STATES OF AMERICA; SHAUN DONOVAN, Secretary of the Department of Housing and Urban Development; PETER ORSZAG, Director, Office of Management and Budget; and TIMOTHY GEITHNER, Secretary of the Department of Treasury of the United States,

Defendants.

OPINION AND ORDER

GERSHON, *District Judge*:

Appendix C

The plaintiffs in this case, the Association of Community Organizations for Reform Now, Inc. ("ACORN") and two of its affiliates, challenge as an unconstitutional bill of attainder a continuing appropriations resolution enacted by Congress that bars ACORN and its affiliates, subsidiaries, and allied organizations from receiving federal funding from the government, even under its ongoing contracts with federal agencies. In doing so, the plaintiffs ask this court to consider the constitutionality of a provision that was approved by both houses of Congress and signed into law by the President. Such a task can be approached only with the utmost gravity; legislative decisions enjoy a high presumption of legitimacy. This is particularly true where the challenge is brought under a rarely-litigated provision of the Constitution, the Bill of Attainder Clause, which has been successfully invoked only five times in the Supreme Court since the signing of the Constitution.

ACORN's critics consider it responsible for fraud, tax evasion, and election violations, and members of Congress have argued that precluding ACORN from federal funding is necessary to protect taxpayer money. ACORN, by contrast, while acknowledging that it has made mistakes, characterizes itself as an organization dedicated to helping the poor, and argues that it has been the object of a partisan attack against its mission. This case does not involve resolution of these contrasting views. It concerns only the means Congress may use to effect its goals. Nor does this case depend upon whether Congress has the right to protect the public treasury from fraud, waste and abuse; it unquestionably does. The question

here is only whether the Constitution allows Congress to declare that a single, named organization is barred from all federal funding in the absence of a trial. Because it does not, and because the plaintiffs have shown the likelihood of irreparable harm in the absence of an injunction, I grant the plaintiffs' motion for a preliminary injunction.

BACKGROUND

On this motion for a preliminary injunction, I have considered the complaint and the various documents and declarations submitted by the parties, who have agreed that there are no disputed issues of fact that need to be decided for the purposes of the motion.

ACORN describes itself as "the nation's largest community organization of low-and-moderate income families." ACORN, in addition to its own work, has affiliations with a number of other organizations, including its co-plaintiffs ACORN Institute, Inc. and New York ACORN Housing Company, Inc. ("NYAHC"). The plaintiffs have, in past years, received millions of dollars in federal funding from a variety of grants, embodied in contractual agreements with various federal agencies, including the Department of Housing and Urban Development ("HUD").

Numerous accusations have been made against ACORN. Most prominently, ACORN came under attack after publication of hidden-camera videos in September of 2009, in which employees of an ACORN affiliate are seen to be advising a purported prostitute and her boyfriend

about how to engage in various illegal activities and evade law enforcement while doing so. Other allegations include that ACORN violated tax laws governing non-profit organizations, misused taxpayer dollars, committed voter fraud, and violated federal election laws by playing an impermissibly partisan role in its voter registration campaign. ACORN alleges that it has responded by terminating staff members found to have engaged in misconduct, reorganizing its board of directors, and hiring new counsel, including a former Attorney General of Massachusetts, to conduct an internal investigation.

In the fall of 2009, in the absence of 2010 appropriations acts for all federal agencies and programs, Congress enacted, and President Obama signed into law, a Continuing Appropriations Resolution ("Continuing Resolution").[1] That Continuing Resolution included the provision at issue in this case, Section 163. Division B—Continuing Appropriations Resolution, 2010, Pub. L. No. 111-68, § 163, 123 Stat. 2023, 2053 (2009). Section 163 reads:

> None of the funds made available by this joint resolution or any prior Act may be provided to the Association of Community Organizations for

1. A continuing resolution is "[l]egislation in the form of a joint resolution enacted by Congress, when the new fiscal year is about to begin or has begun, to provide budget authority for Federal agencies and programs to continue in operation until the regular appropriations acts are enacted." United States Senate Glossary, http://www.senate.gov/reference/glossary_term/continuing_resolution.htm (last visited Dec. 11, 2009).

> Reform Now (ACORN), or any of its affiliates, subsidiaries, or allied organizations.

The Continuing Resolution containing Section 163 went into effect on October 1, 2009, and was extended, on October 31, 2009, to December 18, 2009, when it is now scheduled to expire. Division B—Further Continuing Appropriations Resolution, 2010, Pub. L, No. 111-88, § 101, 123 Stat. 2904, 2972 (2009).[2] As the expiration date for the Continuing Resolution draws near, it is unknown whether there will be a need for a further extension. That will depend on whether all regular appropriations acts are passed; according to the government, only four of the expected thirteen appropriations acts had been enacted as of the date of the preliminary injunction hearing.

On October 7, 2009, Peter Orszag, the Director of the Office of Management and Budget ("OMB") and a defendant here, issued a memorandum to the heads of all executive branch agencies regarding the implementation of Section 163 ("OMB Memorandum"). The OMB Memorandum directs, inter alia, that "[n]o agency or department should obligate or award any Federal funds to ACORN or any of its affiliates, subsidiaries or allied

---

2. The extension of the Continuing Resolution was included in the same law as the 2010 appropriations act for the Department of the Interior, Environment, and Related Agencies. Division A—Dep't of the Interior, Environment and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, § 427, 123 Stat. 2904, 2962 (2009). That appropriations act also includes a restriction on funding for ACORN, using somewhat different language. Only Section 163 of the Continuing Resolution is at issue in this case.

organizations (collectively 'affiliates') during the period of the [Continuing Resolution]," even where the agencies have already determined that funds should be awarded to ACORN, but have not yet entered into binding agreements with the organization to do so. This prohibition applies not just to the 2010 fiscal year, but also to appropriations made in fiscal year 2009, and to any funds left over from prior years' appropriations. In addition, the OMB Memorandum states, agencies should, "where permissible," suspend performance and payment under existing contracts with ACORN and its affiliates, and ask for guidance on any legal considerations from the agencies' own counsel, OMB, or the Department of Justice. Finally, turning to subcontractors, the OMB Memorandum instructs agencies to "take steps so that no Federal funds are awarded or obligated by your grantees or contractors to ACORN or its affiliates" and recommends that each agency notify federal grant and contract recipients about Section 163. On November 19, 2009, HUD gave notice to plaintiff ACORN Institute that it was suspending several of its contracts with the organization because of Section 163.

The plaintiffs filed suit in this court on November 12, 2009, arguing that Section 163 is an unconstitutional bill of attainder and that it violates their rights under both the First Amendment and the Due Process Clause. In their complaint, the plaintiffs alleged that, as a direct consequence of Section 163, agencies have refused to review their grant applications; that grants they were told they would receive have now been rescinded; that previously-awarded grants have not been renewed; and that HUD has refused to pay on its contractual obligations

even for work already performed. More generally, the plaintiffs also alleged that other organizations, such as private corporations and foundations, have cut ties to them as a result of Section 163.

On November 13, 2009, I denied the plaintiffs' request for a temporary restraining order, but required the parties to brief the preliminary injunction motion on an expedited schedule, and heard argument on December 4, 2009.

In opposition to the motion for a preliminary injunction, the government argues that Section 163 is not a bill of attainder because, even though it singles out ACORN, it does not do so for the purpose of punishment. The defendants rely in part on a Department of Justice Office of Legal Counsel ("OLC") memorandum, written by David J. Barron, Acting Assistant Attorney General, in response to a request for guidance from HUD as to whether Section 163 prohibits payments to ACORN to satisfy contractual obligations that arose prior to Section 163's enactment.[3] The OLC memorandum advises HUD that "[S]ection 163 should not be read as directing or authorizing HUD to breach a pre-existing binding contractual obligation to make payments to ACORN or its affiliates, subsidiaries, or allied organizations where doing so would give rise to contractual liability." To read Section 163 otherwise, the memorandum notes, would "undo a binding governmental

3. Although dated October 23, 2009, the memorandum was not released to the plaintiffs or the public until late November. While the memorandum was written specifically for HUD, the government views the memorandum as binding on all agencies of government.

contractual promise." The memorandum explains that its construction of Section 163 not only avoids abrogating "binding governmental contractual promises," but also avoids constitutional concerns, in particular those arising from the Bill of Attainder Clause, that "may be presented by reading the statute, which applies to specific named entities, to abrogate such contracts, including even in cases where performance has already been completed but payment has not been rendered."

The plaintiffs acknowledge that HUD, pursuant to the OLC memorandum, has paid, or has agreed to pay, for work already performed under existing contracts. The plaintiffs, however, complain that the time lag between the release of the OLC memorandum and the notification of suspension prevented them from working, and therefore earning payment, under the existing contracts. They also contend that the government's suspension of existing contracts, based solely on Section 163, violates the Bill of Attainder Clause, as does denial of the opportunity to obtain future contracts, whether renewals or new contracts, for which the plaintiffs are now ineligible.

DISCUSSION

A district court may enter a preliminary injunction "staying government action taken in the public interest pursuant to a statutory or regulatory scheme only when the moving party has demonstrated that [the party] will suffer irreparable injury, and [that] there is a likelihood that [the party] will succeed on the merits of [its] claim." *Alleyne v. N.Y. Educ. Dep't*, 516 F.3d 96, 101 (2d Cir.2008) (internal quotation marks omitted).

Appendix C

A. Likelihood of Success on the Merits

Article I, Section 9, of the Constitution provides that "No Bill of Attainder or ex post facto Law shall be passed."[4] A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977). Enacted as a "bulwark against tyranny" by Congress, "the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature." *United States v. Brown*, 381 U.S. 437, 443, 442, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965). This principle of separation of powers animates bill of attainder jurisprudence; its prohibition "reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *Id.* at 445, 85 S.Ct. 1707.[5]

---

4. The Constitution includes two clauses prohibiting bills of attainder. Article I, Section 9, implicated here, restricts Congress; Article I, Section 10, restricts state legislatures.

5. The Second Circuit has concluded that the Bill of Attainder Clause applies both to individuals and to corporations. *See Consolidated Edison Co. of N.Y., Inc. v. Pataki*, 292 F.3d 338, 346-47 (2d Cir.2002).

Appendix C

Three factors "guide a court's determination of whether a statute directed at a named or readily identifiable party is punitive": first, "whether the challenged statute falls within the historical meaning of legislative punishment;" second, "whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes," an inquiry sometimes referred to as the "functional test"; and third, "whether the legislative record evinces a legislative intent to punish." *See Consolidated Edison Co. of N.Y., Inc. v. Pataki* ("*Con Ed*"), 292 F.3d 338, 350 (2d Cir.2002) (internal quotation marks and alterations omitted). A statute "need not fit all three factors to be considered a bill of attainder; rather, those factors are the evidence that is weighed together in resolving a bill of attainder claim." *Id.*

1. Historical Meaning of Legislative Punishment

As the Second Circuit has explained, "[s]ome types of legislatively imposed harm . . . are considered to be punitive per se." *Id.* at 351. "The classic example is death, but others include "imprisonment, banishment, . . . the punitive confiscation of property, and prohibition of designated individuals or groups from participation in specified employments or vocations." *Id.*[6]

Any consideration of the "historical" meaning of punishment in the bill of attainder context must begin

6. The history of the bill of attainder, and its roots in fourteenth century England, has been described elsewhere. *See, e.g., Brown*, 381 U.S. at 441-49, 85 S.Ct. 1707; *In re Extradition of McMullen*, 989 F.2d 603, 604-06 (2d Cir.1993).

with the handful of Supreme Court cases finding statutes bills of attainder. In each of the five cases in which the Supreme Court has found legislation to violate the Bill of Attainder Clause, the context of the Court's ruling was protection of political liberty[7] In *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 18 L.Ed. 356 (1866), for example, the Court concluded that a statute that barred persons from certain professions unless they took an oath that they had never been connected to an organization "inimical to the government of the United States" was punishment for past association with the Confederacy. *Accord Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 18 L.Ed. 366 (1866); *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234, 21 L.Ed. 276 (1872). Similarly, in *United States v. Brown*, 381 U.S. 437, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965), the Court held that a statute making it a crime for a member of the Communist Party to serve as an officer or employee of a labor union was a bill of attainder. In the fifth case, *United States v. Lovett*, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252 (1946), the Court held that a statute that permanently barred three government employees, who had been accused of being communists, from government service was an unconstitutional bill of attainder.

At first blush, the idea that the deprivation of the opportunity to apply for discretionary federal funds is "punitive" within the meaning of the attainder clause seems implausible. Neither the Supreme Court nor the Second Circuit has been faced with such a claim. One

---

7. Here, plaintiffs allege that ACORN has been punished both for alleged misconduct, such as fraud, and for its alleged impermissible partisanship.

district court, however, in a case much like this one, has concluded that denial of the opportunity to apply for state government contracts amounts to punishment under Article 1, Section 10. *See Fla. Youth Conservation Corps., Inc. v. Stutler*, No. 06-275, 2006 WL 1835967, at *2 (N.D.Fla. June 30, 2006). For the reasons described below, I agree with the district court in Florida and conclude that the discretionary nature of governmental funding does not foreclose a finding that Congress has impermissibly singled out plaintiffs for punishment.

Lovett is particularly instructive in this regard. In *Lovett*, a congressman attacked thirty-nine specifically named government employees, including the plaintiffs, as "irresponsible, unrepresentative, crackpot, radical bureaucrats," and affiliates of "communist front organizations." *Lovett*, 328 U.S. at 308-09, 66 S.Ct. 1073. Following secret hearings, Congress passed an act that no appropriation could then, or later, be used to pay the plaintiffs' government salaries. *Id.* at 312-13, 66 S.Ct. 1073.

The Supreme Court concluded that the appropriations act "clearly accomplishes the punishment of named individuals without a judicial trial." *Id.* at 316, 66 S.Ct. 1073. That Congress placed the prohibition in an appropriations bill carried no weight. "The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty," the Court concluded, "makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal." *Id.*

The government attempts to distinguish this case from *Lovett* on the ground that the plaintiffs in that case had a "vested property interest" in their jobs, whereas here, as the plaintiffs unequivocally acknowledge, they have no right to the award of a grant or contract from the federal government. But the Court in *Lovett* did not base its decision on a property rights analysis. The Supreme Court found a deprivation amounting to punishment under the Bill of Attainder Clause, not only because the plaintiffs were deprived of their earned income on existing government jobs, but also because they were deprived of any future opportunity to serve the government. As the Court stated, "[t]his permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type." *Id.* That the plaintiffs had no right to any particular future job was of no moment.[8]

The government relies on *Flemming v. Nestor*, 363 U.S. 603, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960), to argue that the denial of the opportunity to apply for federal funding cannot be punishment. In *Flemming*, the plaintiff argued that a statute, which denied Social Security benefits to a limited category of deported aliens, was a bill of attainder.

---

8. The government argues that, unlike the provision in *Lovett*, the bar here is "temporary." But even if Section 163 proves to be short-lived—a matter in doubt as, according to the government, nine appropriations acts have yet to be enacted—its effect on ACORN may not be "temporary." Plaintiff ACORN Institute, for example, has a pending application with the Department of Commerce and another with the Environmental Protection Agency, both of which would last three years. Compl., Ex. B (Griffin Aff. ¶¶ 8-9). A short deprivation of the opportunity to apply could therefore have long-term ramifications.

The Supreme Court disagreed, describing the deprivation as only the "mere denial of a noncontractual government benefit" and finding no punitive intent in the design of the statute. *Id.* at 617, 80 S.Ct. 1367. The government also points to *Selective Service System v. Minnesota Public Interest Research Group* ("*Selective Service*"), 468 U.S. 841, 853, 104 S.Ct. 3348, 82 L.Ed.2d 632 (1984), where the Court upheld a statute barring persons who had not registered for the draft from federal student aid as not constituting punishment.

This case is closer to *Lovett* than to *Flemming* or *Selective Service*. The Supreme Court in both *Flemming* and *Selective Service* found the statutes at issue to be nonpunitive. In *Flemming*, the Court concluded that the legislative record "falls short of any persuasive showing that Congress was in fact concerned alone with the grounds of deportation," which, in the plaintiffs case, was prior membership in the Communist party. *Flemming*, 363 U.S. at 619, 80 S.Ct. 1367. In *Selective Service*, the Court reasoned that the statute had the valid goal of encouraging a class of persons to do what they were already legally obligated to do—register for the draft. *See Selective Service*, 468 U.S. at 860, 104 S.Ct. 3348. As discussed further below, I cannot similarly discern any valid, non-punitive purpose for Congress enacting the legislation in this case.

Also, in neither *Flemming* nor *Selective Service* did Congress single out any particular individual or entity for adverse treatment; rather, each statute applied to an entire category of people. Here, in contrast, the

Congressional deprivation is imposed only on ACORN and its affiliates, and, unlike the statute in *Selective Service*, cannot be avoided by ACORN through any conduct on its part. *See Flemming*, 363 U.S. at 619, 80 S.Ct. 1367 (reasoning that, even if the legislative history were read "as evidencing Congress'[s] concern with the grounds [of prior Communist party membership], rather than the fact, of deportation," "[t]his would still be a far cry from the situations involved in [prior Supreme Court cases] where the legislation was on its face aimed at particular individuals."). Cf. *Nixon v. Adm'r of Gen. Services*, 433 U.S. at 485, 97 S.Ct. 2777 (Stevens, J. concurring) (stating that "[i]t has been held permissible for Congress to deprive Communist deportees, as a group, of their social security benefits, but it would surely be a bill of attainder for Congress to deprive a single, named individual of the same benefit. . . . The very specificity would mark it as punishment, for there is rarely any valid reason for such narrow legislation[.]") (citations omitted).

2. **The Functional Test**

I next consider whether Section 163 furthers non-punitive legislative purposes in light of the type and severity of the burdens the statute imposes.

The Court of Appeals for the Second Circuit explored this factor at length in *Consolidated Edison of New York, Inc. v. Pataki*, in which the Court concluded that an act of the New York state legislature constituted an unconstitutional bill of attainder under Article 1, § 10 of the Constitution. 292 F.3d at 345. Based on a finding

that Consolidated Edison ("Con Ed") had "failed to exercise reasonable care on behalf of the health, safety and economic interests of its customers," when it failed to promptly replace steam generators it knew to be faulty, and which then failed, the New York legislature passed a law forbidding Con Ed from passing along the costs associated with the outage to the ratepayers. *Id.* at 344-45.

The Second Circuit found that the State had no valid non-punitive reason that justified singling out Con Ed. It rejected the State's argument that the statute had the legitimate non-punitive purpose of preventing innocent ratepayers from paying for Con Ed's mistakes. The statute, the Court concluded, did more than simply re-distribute or minimize costs. Rather, the "type and severity of the burdens imposed" by the statute belied the legitimacy of the regulatory justification. *Id.* at 353. There was little question that Con Ed could have passed on the cost of obtaining power elsewhere if it had replaced the generators during a scheduled outage; "[w]hat then," the Court asked, "other than punishment can justify forcing Con Ed to absorb these same costs after the accidental outage?" *Id.* Further, the legislature could have enacted "less burdensome alternatives" to achieve its legitimate objectives, such as excluding "those substantial costs that would have been incurred absent misconduct on Con Ed's part." *Id.* at 354.

Here, in defending Section 163, the government argues that, because there was no formal congressional finding of misconduct against ACORN, the bar on all funding to ACORN is not punitive. But, as in Con Ed,

the nature of the bar and the context within which it occurred make it unmistakable that Congress determined ACORN's guilt before defunding it. Wholly apart from the vociferous comments by various members of Congress as to ACORN's criminality and fraud, as described below, no reasonable observer could suppose that such severe action would have been taken in the absence of a conclusion that misconduct had occurred.

The government also emphasizes that Congress withheld funds from plaintiffs for a limited time for the non-punitive reason of protecting "the public fisc," not to penalize ACORN for past wrongdoing. But Congress's interest in preventing future misconduct does not render the statute regulatory rather than punitive. Deterring future misconduct, as Con Ed stressed, is a traditional justification of punishment. *See Con Ed*, 292 F.3d at 353; see also *Brown*, 381 U.S. at 458, 85 S.Ct. 1707; *Selective Service*, 468 U.S. at 851-52, 104 S.Ct. 3348 ("Punishment is not limited solely to retribution for past events, but may involve deprivations inflicted to deter future misconduct.").

The government further suggests that there was an emergency requiring immediate suspension of ACORN's funding and the initiation of an investigation. But under *Con Ed*, there must be some connection between the burdens of the statute and the government's purpose in enacting it. *See Con Ed*, 292 F.3d at 354. Here, although investigations of ACORN by state and federal agencies are underway, no congressional investigation of ACORN was initiated as part of the challenged legislation, nor did Congress order any agency of government to conduct an

investigation. This undercuts the asserted emergency rationale.

Moreover, the award of grants and contracts by federal agencies is governed by comprehensive regulations that have been promulgated to address the very concerns Congress has expressed about ACORN. There is no indication that Congress found these available mechanisms for investigation, leading to possible, and even immediate, suspension, by grant-awarding agencies, inadequate to address the various allegations of misconduct. For example, the Code of Federal Regulations establishes a formal process for determining when federal contractors can be suspended or debarred. *See, e.g.*, 2 C.F.R. Ch. 1, Part 180. Subpart G of this part provides that a suspending official may impose suspension after considering a range of factors; the official can even take "immediate action" if "necessary to protect the public interest." *See, e.g.*, 2 C.F.R. § 180.705 ("In deciding whether immediate action is needed to protect the public interest, the suspending official has wide discretion. . . .").

The government also argues that Congress's enactment of three 2010 appropriations acts containing no bar on funding ACORN, out of four signed into law thus far, belies the alleged punitive intent behind Section 163. This argument of course further undercuts the government's emergency rationale: if there were an emergency requiring the draconian action taken by Congress in Section 163, no explanation has been offered by the government as to why that emergency would apply only for some agencies and not others. And, the

government agrees that, even for those agencies whose appropriations acts do not limit funding for the plaintiffs for fiscal year 2010, the plaintiffs remain barred from available funds appropriated to those agencies in previous years so long as Section 163 is in force. Prel. Inj. Tr. 14-15, Dec. 4, 2009. See also OMB Memorandum (Oct. 7, 2009) ("[T]he text of [S]ection 163 is sufficiently broad to cover funding that was made available for fiscal year (FY) 2009 and prior fiscal years, as well as funding that is or will be made available for FY10."). Most importantly, in the absence of any justification for distinguishing among agencies, that the restriction does not cover every agency's appropriations does not affect its punitive nature.

That ACORN was singled out is obvious and undisputed by the government. In *Nixon*, the Supreme Court found that a statute naming former President Nixon specifically was not necessarily a bill of attainder. The specific mention of his name was "easily explained by the fact that at the time of the Act's passage, only his [papers and recordings] demanded immediate attention." 433 U.S. at 472, 97 S.Ct. 2777. Nixon, and only Nixon, had entered into an agreement with a depository which called for destruction of the materials upon Nixon's death. Thus, Nixon "constituted a legitimate class of one, and this provides a basis for Congress' decision to proceed with dispatch with respect to his materials while accepting the status of his predecessors' papers and ordering the further consideration of generalized standards to govern his successors." *Id.*

Here, the government has offered no similarly unique reason to treat ACORN differently from other contractors and to bar the funding of ACORN without either a judicial trial or the administrative process applicable to all other government contractors. The specificity of Section 163 aggravates the punitive nature of the statute.

As in *Con Ed*, none of the government's justifications stand up to scrutiny. I can discern no non-punitive rationale for Congressional preclusion of the plaintiffs, and the plaintiffs alone, from federal funding.

3. Legislative Intent

The third, and final, element in determining whether an act is punitive is legislative intent. *See Selective Service*, 468 U.S. at 852, 104 S.Ct. 3348. "The legislative record by itself is insufficient evidence for classifying a statute as a bill of attainder unless the record reflects overwhelmingly a clear legislative intent to punish." *Con Ed*, 292 F.3d at 354. Determining Congress's intent is often a difficult exercise; the stated comments of one legislator do not necessarily represent the unspoken thoughts of others who voted for a bill. Particular difficulties present themselves in this case, where legislators have discussed ACORN in a variety of contexts, making it difficult to separate out legislative intent for Section 163 in particular. Nevertheless, since the Supreme Court instructs that legislative intent is a key part of the framework for determining whether a legislative act is a bill of attainder, it must be examined.

Appendix C

Here, the task is made easier because the legislative history that the government itself relies on as evidence of non-punitive intent unmistakably indicates punitive intent. The government relies on the statements of Senator Mike Johanns, who sponsored a provision defunding ACORN in the Department of Interior's appropriation act, which provision is similar to the language of Section 163. He stated that he was proposing the legislation "to defend taxpayers against waste, fraud, and abuse." 155 Cong. Rec. S9517 (daily ed. Sept. 17, 2009). Senator Johanns also urged Congress to act because ACORN was "in an absolute free fall when it comes to allegations of illegal activity" and was "besieged by allegations of fraud and corruption and employee wrongdoing." *Id.* Such statements require an implicit finding of wrongdoing by the plaintiffs; protection of taxpayers' money is a logical justification for Section 163 only if wrongdoing is assumed.

The punitive nature of the just-quoted comments of Senator Johanns is manifest when they are considered in light of Senator Johanns's other comments about ACORN, in the context of other proposed legislation seeking to defund the organization. *See, e.g.*, 155 Cong. Rec. S9317 (daily ed. Sept. 14, 2009) (statement of Sen. Johanns) ("Somebody has to go after ACORN. Madam President, I suggest this afternoon that `somebody' is each and every Member of the Senate."). Other legislators echo this punitive sentiment. *See, e.g.*, 155 Cong. Rec. S9314 (daily ed. Sept. 14, 2009) (statement of Sen. Kit Bond) (stating that "[w]e cannot allow taxpayer funds to support groups engaged in repeated voter registration fraud activities, and now their repeated assistance for

housing, tax, and mortgage fraud.") In addition, the staff of Representative Darrell Issa authored an 88-page report entitled "Is ACORN Intentionally Structured As A Criminal Enterprise?", which states that "ACORN has repeatedly and deliberately engaged in systemic fraud" and accuses ACORN of conspiring to use taxpayer funds for partisan purposes.[9] The government correctly notes that the Issa Report was authored solely by Representative Issa's office and was not commissioned by Congress. Nevertheless, particularly because Senator Johanns himself requested that its executive summary be entered into the congressional record, it is relevant to this inquiry. *See* 155 Cong. Rec. S9309 (daily ed. Sept. 14, 2009) (statement of Sen. Johanns).[10]

---

9. With respect to plaintiffs' allegations that Section 163 is intended to punish ACORN for its impermissible partisanship, a statement Representative Issa made in response to OLC's October 23, 2009 memorandum construing the scope of Section 163 is noteworthy.. In that statement, Representative Issa accused OLC of "old-fashioned cronyism" and stated that "[t]axpayers should not have to continue subsidizing a criminal enterprise that helped Barack Obama get elected President." Press Release, Rep. Darrell Issa, Issa Blasts Administrative Decision to Fund ACORN—Reeks of Political Cronyism (Nov. 27, 2009) (attached to plaintiffs' reply memorandum of law as Exhibit I).

10. At least one representative, Representative Rush Holt, voiced his concern that the provision was a bill of attainder. See 115 Cong. Rec. H9975 (September 25, 2009) (statement of Rep. Holt). In his comments, Rep. Holt referenced a report from the Congressional Research Service. This report, which was written regarding a different bill, "the Defund ACORN Act," analyzed that bill and concluded that "a court would have a sufficient basis to overcome the presumption of constitutionality and find that

Without more, legislative history may not be enough to render the legislation a bill of attainder. But these statements underline the punitive nature of the government's purportedly non-punitive reason. *See Con Ed*, 292 F.3d at 355. ("[T]he stated intent of at least some legislators — most notably one of the floor managers of the legislation — to punish Con Ed reinforces our independent conclusion that a substantial part of the legislation cannot be justified by any legislative purpose but punishment.").

The Supreme Court counseled in *Flemming* that each attainder case "turn[s] on its own highly particularized context." *Flemming*, 363 U.S. at 616, 80 S.Ct. 1367. Here, as in *Lovett*, Congress deprived the plaintiffs of an opportunity available to all others. In these circumstances, where the plaintiffs have received many federal grants and contracts over the years, it cannot be said that such deprivation is anything short of punishment as that has been understood in the bill of attainder cases. Section 163, by singling out ACORN and its affiliates for severe, sweeping restrictions, constitutes punishment under the three factors the Supreme Court has articulated for making this determination. I therefore conclude that the plaintiffs have established a likelihood of success on the merits of their bill of attainder claim.[11]

[the Defund ACORN Act violates the prohibition against bills of attainder." Kenneth Thomas, U.S. Congressional Research Service Report for Congress: The Proposed `Defund ACORN Act': Is it a Bill of Attainder? (Sept. 22, 2009). The Defund ACORN Act has not been enacted, and is not at issue in this case.

11. Because I find Section 163 unconstitutional under the Bill of Attainder Clause, I do not reach the plaintiffs' claims under the First Amendment and the Due Process Clause.

B. Irreparable Harm

That the plaintiffs have shown a likelihood of success on the merits does not alone entitle them to a preliminary injunction. Rather, irreparable harm is "[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction." *Bell & Howell: Mamiya Co. v. Masel Supply Co. Corp.*, 719 F.2d 42, 45 (2d Cir.1983) (internal quotation marks omitted). If an injury can be compensated by monetary damages, then "no irreparable injury may be found to justify specific relief." *Register. com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir.2004). "But, irreparable harm may be found where damages are difficult to establish and measure." *Id.*

The plaintiffs have been the recipients of significant federal grants; their expectations of awards of renewals and new grants cannot be dismissed as speculative. The government does not dispute that ACORN Institute has pending contracts that have been suspended while Section 163 is in force. For example, ACORN Institute has six ongoing contracts with HUD, totaling approximately $40,000 to $60,000 per year, to provide services to public housing residents, which contracts have been suspended. Plaintiff NYAHC has a subcontract that was funded by HUD that also was suspended. The government also does not dispute that ACORN Institute has pending applications with federal agencies which will not be considered while Section 163 is in force. For example, ACORN Institute cites pending applications with both the Department of Commerce and the Environmental Protection Agency. It is undisputed that those contracts may be awarded to other

parties, and then become unavailable to the plaintiffs. Nor does the government dispute that ACORN Institute had been approved as a subcontractor on a grant funded by the Department of Agriculture, but, before the contract for that grant could be signed, the contractor cancelled the grant because of Section 163. ACORN Institute also asserts that it had another subcontract, also funded by the Department of Agriculture, that would have been renewed if not for Section 163.

The plaintiffs identify these harms, and a wide range of others, as irreparable. Several of the harms that the plaintiffs allege, such as the layoff of a large percentage of ACORN Institute's staff, undoubtedly cannot at this point be attributed solely to Section 163. But the government does not dispute that the deprivation of the opportunity to obtain renewals of existing contracts and compete for other contracts is non-compensable by money damages. *See Lion Raisins, Inc. v. United States*, 52 Fed.Cl. 115 (Fed.Cl.2002) (concluding that the plaintiff, which was wrongfully suspended from government contracting, could not recover its lost profits on a contract that its suspension precluded it from bidding on). Notably, even in non-constitutional cases that involve suspension or debarment from federal contracting, courts have granted preliminary injunctive relief where money damages will not be available and where the contractor has made a sufficient showing on the merits of its claim. *See, e.g., Alf v. Donley*, 666 F.Supp.2d 60, (D.D.C.2009) (taking into account the plaintiffs inability to recoup lost income because of sovereign immunity as a factor in finding irreparable harm). Even putting aside the role of

sovereign immunity in barring the recovery of damages, and any other limitations on the recovery of damages by government contractors where sovereign immunity has been waived, the amount of money the plaintiffs might have been awarded had they been allowed to compete for contracts is, as the government acknowledges, impossible to calculate.

A finding of significant violation of constitutional rights also supports the finding of irreparable harm. *See Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir.1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."); see also 11A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, Federal Practice And Procedure § 2948.1 (2d ed. 2009) (same). For all of the above-described reasons, I conclude that the plaintiffs have established the likelihood of irreparable harm.

Finally, issuance of a preliminary injunction will serve the public interest. In deciding preliminary injunction motions, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. Natural Res. Def. Council, Inc.*, ___ U.S. ___, 129 S.Ct. 365, 376, 172 L.Ed.2d 249 (2008). The plaintiffs have raised a fundamental issue of separation of powers. They have been singled out by Congress for punishment that directly and immediately affects their ability to continue to obtain federal funding, in the absence of any judicial, or even administrative, process adjudicating guilt. The potential harm to the government, in granting the injunction, is less.

The public will not suffer harm by allowing the plaintiffs to continue work on contracts duly awarded by federal agencies, which was stopped solely by reason of Section 163. For grants for which the plaintiffs have applied, or for which they will apply, each agency will continue to be able to use its discretion to determine the merit of the plaintiffs' proposals, and to suspend the contracts for cause, or even to debar ACORN, if warranted under the terms and procedures in the contracts and applicable regulations. Therefore, balancing "the competing claims of injury," I find a preliminary injunction to be in the public interest.

CONCLUSION

The plaintiffs have established a likelihood of success on the merits of their bill of attainder claim. They have also established the likelihood of irreparable harm absent an injunction and that issuance of a preliminary injunction is in the public interest. Therefore the plaintiffs' motion for a preliminary injunction is GRANTED.[12] A preliminary injunction in the following form shall issue:

---

12. Although Rule 65 provides that "no restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper," "an exception to the bond requirement has been crafted for, inter alia, cases involving the enforcement of 'public interests'...." *Pharmaceutical Soc. of State of New York, Inc. v. N.Y. Dep't of Soc. Services*, 50 F.3d 1168, 1174 (2d Cir.1995). Because I find this action, which implicates important constitutional questions, to be in the public interest, the bond requirement is waived.

Appendix C

Defendants the UNITED STATES OF AMERICA; SHAUN DONOVAN, in his official capacity as Secretary of the Department of Housing and Urban Development; PETER ORSZAG, in his official capacity as Director of the Office of Management and Budget; and TIMOTHY GEITHNER, in his official capacity as Secretary of the Department of Treasury of the United States; and all those acting in concert with them, are hereby

ENJOINED, during the pendency of this action, from enforcing Section 163 of Division B—Continuing Appropriations Resolution, 2010, Pub. L. No. 111-68, § 163, 123 Stat. 2023, 2053 (2009), as renewed by Division B—Further Continuing Appropriations Resolution, 2010, Pub. L. No. 111-88, § 101, 123 Stat. 2904, 2972 (2009), which provides that "None of the funds made available by this joint resolution or any prior Act may be provided to the Association of Community Organizations for Reform Now (ACORN), or any of its affiliates, subsidiaries, or allied organizations." The defendants are hereby further

ENJOINED, during the pendency of this action, from enforcing the Office of Management and Budget Memorandum, entitled "Memorandum for the Heads of Executive Departments and Agencies" providing "[g]uidance on [S]ection 163 of the Continuing Resolution regarding the Association of Community Organizations for Reform Now (ACORN)," dated October 7, 2009.

SO ORDERED.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING REHEARING PETITION, FILED NOVEMBER 23, 2010

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Civil Action Nos. 09-5172-cr (L), 10-0992-cv (CON)

Filed: November 23, 2010

ACORN, ACORN INSTITUTE, INC., and MHANY MANAGEMENT, INC., f/k/a/ New York Acorn Housing Company, Inc.,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA, SHAUN DONOVAN, Secretary of the Department of Housing and Urban Development, PETER ORSZAG Director Office of Management and Budget, TIMOTHY R. GEITHNER JR., Secretary of the Department of Treasury of the United States, LISA P. JACKSON, Administrator of the Environmental Protection Agency, GARY LOCKE, Secretary of Commerce, and ROBERT GATES, Secretary of Defense,

Defendants-Appellants.

Appendix D

Appellees having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]

APPENDIX E — CONTINUING APPROPRIATIONS RESOLUTION OF 2010, DIVISION B, § 163, PUB. L. NO. 111-68, 123 STAT. 2023, 2053. OCT. 1, 2009

CONTINUING APPROPRIATIONS RESOLUTION, 2010

PUBLIC LAW 111-68 [H.R. 2918]

OCT. 1, 2009

111 P.L. 68; 123 STAT. 2023;
2009 ENACTED H.R. 2918;
111 ENACTED H.R. 2918

An Act

Making appropriations for the Legislative Branch for the fiscal year ending September 30, 2010, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

. . .

DIVISION B--CONTINUING APPROPRIATIONS RESOLUTION, 2010

. . .

Appendix E

[123 STAT. at 2053] Sec. 163. None of the funds made available by this joint resolution or any prior Act may be provided to the Association of Community Organizations for Reform Now (ACORN), or any of its affiliates, subsidiaries, or allied organizations.

APPENDIX F — DEPARTMENT OF THE INTERIOR, ENVIRONMENT, AND RELATED AGENCIES APPROPRIATIONS ACT OF 2010, PUB. L. NO. 111-88

DEPARTMENT OF THE INTERIOR, ENVIRONMENT, AND RELATED AGENCIES APPROPRIATIONS ACT, 2010

PUBLIC LAW 111-88 [H.R. 2996]

OCT. 30, 2009

111 P.L. 88; 123 STAT. 2904;
2009 ENACTED H.R. 2996;
111 ENACTED H.R. 2996

An Act

Making appropriations for the Department of the Interior, environment, and related agencies for the fiscal year ending September 30, 2010, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

. . .

DIVISION A--DEPARTMENT OF THE INTERIOR, ENVIRONMENT, AND RELATED AGENCIES APPROPRIATIONS ACT, 2010

Appendix F

The following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of the Interior, environment, and related agencies for the fiscal year ending September 30, 2010, and for other purposes, namely:

. . .

[123 STAT. at 2962] Sec. 427. None of the funds made available under this Act may be distributed to the Association of Community Organizations for Reform Now (ACORN) or its subsidiaries.

. . .

DIVISION B--FURTHER CONTINUING APPROPRIATIONS, 2010

[123 STAT. at 2972] Sec. 101. The Continuing Appropriations Resolution, 2010 (division B of Public Law 111-68) is amended by striking the date specified in section 106(3) and inserting "December 18, 2009".

APPENDIX G — CONSOLIDATED APPROPRIATIONS ACT OF 2010, PUB. L. NO. 111-117

CONSOLIDATED APPROPRIATIONS ACT, 2010

PUBLIC LAW 111-117 [H.R. 3288]

DEC. 16, 2009

111 P.L.117; 123 STAT. 3034; 2009 ENACTED H.R. 3288;
111 ENACTED H.R. 3288

An Act

Making appropriations for the Departments of Transportation, and Housing and Urban Development, and related agencies for the fiscal year ending September 30, 2010, and for other purposes.

. . .

DIVISION A--TRANSPORTATION, HOUSING AND URBAN DEVELOPMENT, AND RELATED AGENCIES APPROPRIATIONS ACT, 2010

. . .

[123 STAT. at 3112] Sec. 418. None of the funds made available under this Act or any prior Act may be provided to the Association of Community Organizations for Reform Now (ACORN), or any of its affiliates, subsidiaries, or allied organizations.

Appendix G

. . .

DIVISION B--COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES APPROPRIATIONS ACT, 2010

. . .

[123 STAT. at 3157-58] Sec. 534. None of the funds made available under this Act may be distributed to the Association of Community Organizations for Reform Now (ACORN) or its subsidiaries.

Sec. 535. (a) The Comptroller General of the United States shall conduct a review and audit of Federal funds received by the Association of Community Organizations for Reform Now (referred to in this section as "ACORN") or any subsidiary or affiliate of ACORN to determine—

(1) whether any Federal funds were misused and, if so, the total amount of Federal funds involved and how such funds were misused;

(2) what steps, if any, have been taken to recover any Federal funds that were misused;

(3) what steps should be taken to prevent the misuse of any Federal funds; and

(4) whether all necessary steps have been taken to prevent the misuse of any Federal funds.

(b) Not later than 180 days after the date of enactment of this Act, the Comptroller General shall submit to Congress a report on the results of the audit required under subsection (a), along with recommendations for Federal agency reforms.

. . .

DIVISION E--MILITARY CONSTRUCTION AND VETERANS AFFAIRS AND RELATED AGENCIES APPROPRIATIONS ACT, 2010

. . .

[123 STAT. at 3311] Sec. 511. None of the funds made available in this division or any other division in this Act may be distributed to the Association of Community Organizations for Reform Now (ACORN) or its subsidiaries.

APPENDIX H — DEPARTMENT OF DEFENSE APPROPRIATIONS ACT OF 2010, PUB. L. NO. 111-118, DIVISION A, § 8123, 123 STAT. 3409, 3458. DEC. 19, 2009

DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2010

PUBLIC LAW 111-118 [H.R. 3326]

DEC. 19, 2009

111 P.L.118; 123 STAT. 3409; 2009 ENACTED H.R. 3326; 111 ENACTED H.R. 3326

An Act

Making appropriations for the Department of Defense for the fiscal year ending September 30, 2010, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

. . .

DIVISION A--DEPARTMENT OF DEFENSE APPROPRIATIONS

. . .

[123 STAT. at 3458] Sec. 8123. None of the funds made available under this Act may be distributed to the Association of Community Organizations for Reform Now (ACORN) or its subsidiaries.

No. 10-1068

In the Supreme Court of the United States

ACORN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MARK B. STERN
HELEN L. GILBERT
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly held that provisions in Fiscal Year 2010 appropriations acts, which bar distribution of federal funds to petitioner ACORN and its affiliates, subsidiaries, and allied organizations, are not unconstitutional bills of attainder.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	23

TABLE OF AUTHORITIES

Cases:

BellSouth Corp. v. *FCC*, 162 F.3d 678 (D.C. Cir. 1998) 14, 18, 20

Citizens United v. *FEC*, 130 S. Ct. 876 (2010) 20

Consolidated Edison of New York, Inc. v. *Pataki*, 292 F.3d 338 (2d Cir.), cert. denied, 537 U.S. 1045 (2002) 13, 19

Cummings v. *Missouri*, 71 U.S. (4 Wall.) 277 (1866) 11

First Nat'l Bank v. *Bellotti*, 435 U.S. 765 (1978) 19

Flemming v. *Nestor*, 363 U.S. 603 (1960) 11, 16

Foretich v. *United States*, 351 F.3d 1198 (D.C. Cir. 2003) 17, 18

Garland, Ex parte, 71 U.S. (4 Wall.) 333 (1866) 11

Major League Baseball Players Ass'n v. *Garvey*, 532 U.S. 504 (2001) 21

Nixon v. *Administrator of Gen. Servs.*, 433 U.S. 425 (1977) 10, 12, 14, 18

O'Hare Truck Serv., Inc. v. *City of Northlake*, 518 U.S. 719 (1996) 20

Pierce v. *Carskadon*, 83 U.S. (16 Wall.) 234 (1872) 11

Sabri v. *United States*, 541 U.S. 600 (2004) 15

Cases—Continued Page

SeaRiver Mar. Fin. Holdings Inc. v. *Mineta*, 309 F.3d 662 (9th Cir. 2002) 14, 18
Selective Serv. Sys. v. *Minnesota Pub. Interest Research Group*, 468 U.S. 841 (1984) ..... *passim*
United States v. *Brown*, 381 U.S. 437 (1965) 11, 12
United States v. *Lovett*, 328 U.S. 303 (1946) 11
United States v. *White*, 322 U.S. 694 (1944) 19

Constitution and statutes:

U.S. Const.:
Art. I, § 9, Cl. 3 (Bill of Attainder Clause) ..... *passim*
Amend. I 7, 8, 20
Amend. V (Due Process Clause) 7
Act of Oct. 30, 2009, Pub. L. No. 111-88, Div. B, § 101, 123 Stat. 2972 5
Bankruptcy Code, Ch. 7, 11 U.S.C. 701 *et seq.* 21
Commerce, Justice, Science, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-117, Div. B, § 535, 123 Stat. 3157-3158 (2009) 6
Consolidated Appropriations Act, 2010, Pub. L. No. 111-117 (2009):
Div. B, § 534, 123 Stat. 3157 5
Div. E, § 511, 123 Stat. 3311 ..... 5, 6
Continuing Appropriations Resolution, 2010, Pub. L. No. 111-68, Div. B, § 163, 123 Stat. 2053 (2009) 4
Department of Defense and Full-Year Continuing Appropriations Act, 2011, H.R. 1473, 112th Cong., 1st Sess. 7

Statutes—Continued. Page

Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, Div. A, § 8123, 123 Stat. 3458 (2009) 5

Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, Div. A, § 427, 123 Stat. 2904 (2009) 5

Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-117, Div. A, § 418, 123 Stat. 3112 (2009) 6

Miscellaneous:

1 William Blackstone, *Commentaries* 19

Scott Harshbarger & Amy Crafts, *An Independent Governance Assessment of ACORN* (Dec. 7, 2009), http://www.proskauer.com/files/uploads/report2.pdf 2, 3, 4

Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) 14

United States Dep't of Justice, Office of Legal Counsel, *Applicability of Section 163 of Division B of Public Law 111-68 to Payments in Satisfaction of Existing Contractual Obligations*, Oct. 23, 2009, http://www.justice.gov/olc/2009/obligations-public-law11168.pdf 5

United States Government Accountability Office, *GAO-10-648R, Preliminary Observations on Funding, Oversight, and Investigations and Prosecutions of ACORN or Potentially Related Organizations* (2010) 16

In the Supreme Court of the United States

No. 10-1068

ACORN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 618 F.3d 125. The March 10, 2010, order of the district court granting a permanent injunction and declaratory judgment (Pet. App. 32a-77a) is reported at 692 F. Supp. 2d 260. The December 11, 2009, order of the district court granting a preliminary injunction (Pet. App. 78a-105a) is reported at 662 F. Supp. 2d 285.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 2010. A petition for rehearing was denied on November 23, 2010 (Pet. App. 106a-107a). The petition for a writ of certiorari was filed on February 22, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the Association of Community Organizations for Reform Now (ACORN), a nonprofit organization, and its eligibility to receive federal grant monies in the current fiscal year. Because ACORN has an "incredibly complex" organizational and governance structure, Pet. App. 5a (citation omitted), this brief (like the court of appeals) draws on the report of an internal investigation commissioned by ACORN itself. See Scott Harshbarger & Amy Crafts, *An Independent Governance Assessment of ACORN* (Dec. 7, 2009), http://www.proskauer.com/files/uploads/report2.pdf (*Harshbarger Report*).[1]

a. ACORN is a nonprofit corporation that, as of the filing of this action, claimed 500,000 members located in 75 cities. Pet. App. 3a; 2d Am. Compl. ¶ 20. ACORN maintains close affiliations and relationships with numerous formally separate entities that together constitute the "ACORN Family." *Harshbarger Report* 6; Pet. App. 5a. The "number of separate but interrelated components" in the ACORN Family "at one point was estimated at approximately 200 entities," although by 2008 that number stood at 29 entities, including petitioners Acorn Institute and New York Acorn Housing Co. (New York Acorn). *Harshbarger Report* 6; Pet. App. 4a-5a. New York Acorn is now known as MHANY Management, Inc.

As of the fall of 2009, ACORN received approximately ten percent of its funding from the federal government. Acorn Institute has received federal grants and collaborates closely with ACORN to carry out many of

---

[1] The Harshbarger Report is in the lower-court record in this case C.A. App. 258-304.

these grants. New York Acorn has received funding from the federal Department of Housing and Urban Development (HUD) through the New York State Housing Finance Agency. Pet. App. 3a-4a.

b. ACORN has been plagued by serious mismanagement, including embezzlement at its highest levels. In 1999 and 2000, Dale Rathke, the brother of ACORN's founder Wade Rathke, embezzled nearly $1 million from the organization. ACORN's officers failed to notify law enforcement officials or even ACORN's board of directors until June 2008, when a whistleblower forced ACORN to disclose the embezzlement. An internal report commissioned by ACORN in the wake of the embezzlement scandal detailed "'potentially improper use of charitable dollars for political purposes' as well as possible violations of federal law by ACORN and its 'web' of nearly 200 affiliated organizations." Pet. App. 5a.

In 2009, a new scandal arose when hidden cameras recorded ACORN employees and volunteers providing advice and supportive counseling to what appeared to be a proposed prostitution enterprise. Pet. App. 5a-6a. The Harshbarger Report concluded that the conduct recorded on the videos "represent[ed] the byproduct of ACORN's longstanding management weaknesses," *Harshbarger Report* 3, and "criticized ACORN's * * * overall failure to provide adequate organizational infrastructure necessary to manage and oversee its operations." Pet. App. 6a.

ACORN workers have also been convicted of voter registration fraud. Between October 2008 and May 2009, two more ACORN workers were charged with and convicted of voter registration fraud. Pet. App. 5a. The Harshbarger Report observed that "[t]he hidden camera

controversy [wa]s perceived by many as a third strike against ACORN on the heels of the disclosure in June 2008 of an embezzlement cover-up, which triggered the firing of ACORN's founder, and the allegations of voter registration fraud during the 2008 elections." *Harshbarger Report* 2; see also *id.* at 2 n.1 (noting that the Report did not examine voting-fraud allegations).

2. Following the revelation of those instances of misconduct and mismanagement, the federal government re-evaluated ACORN's fitness for federal funding.

a. First, in September 2009, two federal agencies—the Internal Revenue Service and the Census Bureau—terminated their relationships with ACORN in response to evidence of ACORN's misconduct. Pet. App. 6a.[2] Also in September 2009, Members of Congress asked the Government Accountability Office (GAO) to begin an investigation of ACORN, out of concern that the organization was improperly using federal funds. *Ibid.*

b. The next month, Congress enacted a restriction on ACORN's eligibility for federal funds as part of the 2010 continuing appropriations resolution, the measure that funded federal agencies until Congress enacted appropriations legislation for Fiscal Year 2010 (FY 2010). Pet. App. 7a; see Continuing Appropriations Resolution, 2010 (2010 Continuing Resolution), Pub. L. No. 111-68, Div. B, § 163, 123 Stat. 2053 (2009) (Pet. App. 108a-109a). Section 163 of the 2010 Continuing Resolution provided that "[n]one of the funds made available by this joint resolution or any prior Act may be provided to the Association of Community Organizations for Reform

---

[2] Several States also suspended their funding of ACORN. Pet. App. 6a-7a.

Now (ACORN), or any of its affiliates, subsidiaries, or allied organizations."

In response to a request by HUD for guidance, the Office of Legal Counsel of the Department of Justice issued a memorandum explaining that the 2010 Continuing Resolution did not preclude agencies from making payments in satisfaction of pre-existing contractual obligations. *Applicability of Section 168 of Division B of Public Law 111-68 to Payments in Satisfaction of Existing Contractual Obligations* (Oct. 23, 2009), http://www.justice.gov/olc/2009/obligations-public-law11168.pdf (*OLC Memorandum*); see Pet. App. 8a.

The 2010 Continuing Resolution, along with its restrictions on ACORN funding, expired on December 18, 2009. See Act of Oct. 30, 2009, Pub. L. No. 111-88, Div. B, § 101, 123 Stat. 2972 (Pet. App. 111a).

c. When Congress subsequently adopted appropriations legislation to fund the federal government for FY 2010, it included restrictions on funding to ACORN by certain departments and agencies. Five provisions in certain FY 2010 appropriations acts bar distribution of funds to ACORN and related organizations. Four of those provisions specify that none of the federal funds appropriated under the relevant statute "may be distributed to the Association of Community Organizations for Reform Now (ACORN) or its subsidiaries."[3] The fifth,

---

[3] See Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, Div. A, § 427, 123 Stat. 2904, 2962 (2009) (Pet. App. 110a-111a); Department of Defense Appropriations Act, 2010, Pub. L. No 111-118, Div. A, § 8123, 123 Stat. 3409, 3458 (2009) (Pet. App. 115a), Consolidated Appropriations Act, 2010 (2010 Consolidated Act), Pub. L. No. 111-117, Div. B, § 534, 123 Stat. 3157 (2009) (Pet. App. 113a); *id.* Div. E, § 511, 123 Stat. 3311 (Pet. App. 114a). The restriction in Division E of the 2010 Consolidated Act

which applies only to appropriations for the Department of Transportation, HUD, and related agencies, covers a slightly broader set of organizations related to ACORN: "None of the funds made available under this Act or any prior Act may be provided to the Association of Community Organizations for Reform Now (ACORN), or any of its affiliates, subsidiaries, or allied organizations."[4] See also Pet. App. 41a n.4 (listing FY 2010 appropriations acts not covered by ACORN-related funding restrictions).

In enacting the 2010 appropriations measures, Congress formally directed the Comptroller General (the head of the GAO) to "conduct a review and audit of Federal funds received by [ACORN] or any subsidiary or affiliate of ACORN" to determine whether any federal funds were misused, what steps can be taken to recover misused funds and prevent the misuse of funds, and whether all necessary steps were taken to prevent the misuse of funds. Congress required that the Comptroller General complete the investigation and report to Congress within 180 days.[5]

---

applies to "funds made available in this division or any other division in this Act." *Ibid.* The six divisions of that Act cover Transportation, HUD, and Related Agencies; Commerce, Justice, Science, and Related Agencies; Financial Services and General Government; Labor, Health and Human Services, and Education, and Related Agencies; Military Construction and Veterans Affairs and Related Agencies; and Department of State, Foreign Operations, and Related Programs.

[4] Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-117, Div. A, § 418, 123 Stat. 3112 (2009) (Pet. App. 112a). That statute is Division A of the larger 2010 Consolidated Act.

[5] Commerce, Justice, Science, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-117, Div. B, § 635, 123 Stat. 3157-3158 (2009)

These provisions, along with most other provisions of FY 2010 appropriations measures, have been extended through the end of FY 2011 and are set to expire on September 30, 2011. See Department of Defense and Full-Year Continuing Appropriations Act, 2011, H.R. 1473, 112th Cong., 1st Sess. §§ 1101, 1104, 1106 (2011) (signed by the President on April 15, 2011, and to be published as Pub. L. No. 112-10).

3. On November 12, 2009, following the adoption of the 2010 Continuing Resolution, petitioners filed this action to enjoin the enforcement of the ACORN-related provision of that resolution. Petitioners alleged that the provision violated the Bill of Attainder Clause, U.S. Const. Art. I, § 9, Cl. 3, the First Amendment, and the Due Process Clause of the Fifth Amendment. They named as defendants the United States, the Secretary of the Treasury, the Secretary of HUD, and the Director of the Office of Management and Budget. Pet. App. 8a.

The district court concluded that petitioners were likely to succeed on their claim under the Bill of Attainder Clause, and it entered a preliminary injunction prohibiting enforcement of the restriction against providing federal funds to ACORN. Pet. App. 78a-105a. The government filed an appeal of the preliminary injunction.

After the preliminary injunction issued, plaintiffs amended their complaint to include the five ACORN-related provisions in the FY 2010 appropriations acts. Plaintiffs also added three new defendants: the Administrator of the Environmental Protection Agency, the Secretary of Commerce, and the Secretary of Defense. Pet. App. 10a.

(Pet. App. 113a) That statute is Division B of the larger 2010 Consolidated Act.

On March 10, 2010, the district court held in petitioners' favor under the Bill of Attainder Clause. Pet. App. 33a-77a. The court entered a declaratory judgment and a permanent injunction against the ACORN-related provisions of both the 2010 Continuing Resolution and the FY 2010 appropriations acts. *Id.* at 33a, 75a. The court did not address petitioners' First Amendment and due process claims.

4. The government timely appealed from the final judgment, and the court of appeals stayed the injunction pending appeal. Pet. App. 11a. Petitioners then applied to Justice Ginsburg to vacate the stay; Justice Ginsburg denied the application. *Association of Cmty. Orgs. for Reform Now* v. *United States*, No. 09A1000 (Apr. 23, 2010).

5. The court of appeals reversed the district court's Bill of Attainder Clause ruling and remanded the case for further proceedings on petitioners' other claims. Pet. App. 1a-32a.[6]

The court held that the challenged funding restrictions did not amount to legislative punishment and, therefore, did not violate the Bill of Attainder Clause. The court considered the three factors that, under this Court's decisions, guide consideration of whether a legislative act is punishment: (1) whether the statute falls within the historical meaning of legislative punishment; (2) "whether the statute, 'viewed in terms of the type and severity of the burdens imposed, reasonably can be said to further nonpunitive legislative purposes'"; and

---

[6] While the case was pending in the court of appeals, HUD determined that petitioner SUHANY Management, Inc., formerly known as New York Acorn, was no longer an "affiliate, subsidiary, or allied organization of ACORN." Pet. App. 4a n.2 (citing Gov't C.A. R. 28(j) Letter (July 8, 2010)).

(3) "whether the legislative record evinces a [legislative] intent to punish.'" Pet. App. 18a (brackets in original) (quoting *Selective Service Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841, 852 (1984)).

The court first determined that "withholding of appropriations * * * does not constitute a traditional form of punishment." Pet. App. 20a. Petitioners were not prohibited from any activities, but rather were only temporarily restricted from receiving federal funds to pay for those activities. *Id.* at 21a. The court of appeals concluded that that restriction was well within the congressional power of the purse; "Congress must have the authority to suspend federal funds to an organization that has admitted to significant mismanagement." *Ibid.* And, the court noted, ACORN derived only ten percent of its funding from the federal government, undermining petitioners' claims that the funding restriction alone targeted ACORN's very existence rather than its eligibility for grants. *Id.* at 20a.

The court next held that the appropriations provisions were reasonably tailored to serve the "non-punitive goal of protecting public funds from future fraud and waste." Pet. App. 28a-29a. The means Congress chose to further that goal were unlike past bills of attainder, such as "permanent disqualification from a certain vocation or criminalizing past conduct," the court concluded. *Id.* at 27a.

Finally, the court reiterated this Court's admonitions that "[t]he legislative record by itself is insufficient evidence for classifying a statute as a bill of attainder unless the record reflects overwhelmingly a clear legislative intent to punish." Pet. App. 29a. Applying that standard, the court concluded that petitioners had identified at most a "'smattering'" of statements by "a hand-

ful of legislators"—not enough to show an impermissible legislative intent to punish. *Id.* at 81a-82a.

6. The court of appeals denied rehearing en banc without recorded dissent. Pet. App. 106a-107a.

7. At petitioners' request, the district court has stayed proceedings on petitioners' remaining constitutional claims pending this Court's disposition of the petition for a writ of certiorari. See Order (May 9, 2011).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Furthermore, this case is in an interlocutory posture and may not even remain a continuing controversy, given the scheduled expiration of the challenged provisions and the bankruptcy of two petitioners. Review by this Court is therefore not warranted.

1. The Constitution provides that "[n]o Bill of Attainder * * * shall be passed." U.S. Const., Art. I, § 9, Cl. 3. A constitutionally forbidden bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 468 (1977); *Selective Service Sys.* v. *Minnesota Pub. Interest Research Group*, 468 U.S. 841, 846-847 (1984).

This Court has made clear that "[t]he proscription against bills of attainder reaches only statutes that inflict *punishment* on the specified individual or group." *Selective Service*, 468 U.S. at 851 (emphasis added). The Court has invalidated legislation on this basis on only five occasions. In each instance, the Court invalidated an attempt to punish individuals for political beliefs and affiliations, and the Court did so only upon unmistakable

evidence of punitive intent by the legislature and an absence of any legitimate non-punitive purpose. Three cases involved Civil War-era laws that imposed statutory disabilities on persons who refused to take an oath that they had not supported the Confederacy. *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1866); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866); *Pierce* v. *Carskadon*, 83 U.S. (16 Wall.) 234 (1872). The two 20th-century cases involved congressional attempts to punish "subversives" or members of the Communist Party by barring them from certain jobs. *United States* v. *Lovett*, 328 U.S. 303 (1946); *United States* v. *Brown*, 381 U.S. 437 (1965).

This Court has distilled from those decisions a three-part inquiry that reflects the limited scope of this constitutional restriction. To determine whether an Act of Congress constitutes legislative punishment, a court considers whether a statute (1) "falls within the historical meaning of legislative punishment"; (2) whether it "further[s] nonpunitive legislative purposes"; and (3) whether the legislative record "evinces a congressional intent to punish." *Selective Service*, 468 U.S. at 852. Without a persuasive showing on the first two prongs, "only the clearest proof could suffice to establish the unconstitutionality of a statute" on the basis of impermissible congressional motive alone. *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960).

2. The court of appeals correctly applied these decisions in holding that the challenged appropriations provisions are not unconstitutional bills of attainder.

a. The court properly concluded that a restriction on a corporation's ability to obtain discretionary grants and new government contracts in a particular fiscal year does not fit with the historically recognized forms of

punishment that this Court's decisions have discussed. Historically, bills of attainder involved "imprisonment, banishment, and the punitive confiscation of property" by the sovereign. *Selective Service*, 468 U.S. at 852. Like these traditional subjects of bills of attainder, "legislative bars to participation by individuals or groups in specific employments or professions," *ibid.*, are "a mode of punishment commonly employed against those legislatively branded as disloyal" and implicate the traditional understanding of a bill of attainder as punishment of "persons considered disloyal to the Crown or State." *Nixon*, 433 U.S. at 474; see also *Brown*, 381 U.S. at 455 (condemning the unsound "suggestion that membership in the Communist Party, or any other political organization," demonstrates general unfitness for government employment.").

A corporation's inability to bid for certain discretionary grants or new contracts in a single fiscal year may impose a burden, but it is qualitatively different from an individual's banishment from a profession. The court of appeals correctly observed that petitioners "are not prohibited from any activities; they are only prohibited from receiving federal funds to continue their activities." Pet. App. 21a. As the Court in *Selective Service* emphasized, a statute denying funds to which individuals had no entitlement "impose[d] none of the burdens historically associated with punishment" such as imprisonment, banishment, confiscation of property, and bars from employment. 468 U.S. at 852-853.

The court of appeals recognized that under circuit precedent, the Bill of Attainder Clause applies to statutes directed at corporations as well as measures aimed at individuals. It noted, however, that "[t]here may well be actions that would be considered punitive if taken

against an individual, but not if taken against a corporation." Pet. App. 20a (quoting *Consolidated Edison of New York, Inc.* v. *Pataki*, 292 F.3d 338, 351 (2d Cir.) (*Con Ed*), cert. denied, 537 U.S. 1045 (2002)) (brackets in original). Some of these distinctions are self evident and illustrated by this controversy. Corporations may merge, dissolve or reorganize—options that are not open to an individual. Thus, during this litigation, petitioner MHANY Management, Inc. changed its name from New York Acorn Housing Inc. to avoid association with ACORN, and as the court of appeals noted, HUD determined that MHANY is not an ally, affiliate, or subsidiary of ACORN. *Id.* at 4a n.2.

b. The court of appeals correctly concluded that the legislation directly furthers the legitimate, non-punitive purpose of promoting effective use of taxpayer money in the face of clear evidence of mismanagement and inadequate employee oversight. As the court observed, petitioners do not dispute that "Congress has a legitimate interest in ensuring the proper use of taxpayer money," but argue instead that the provisions are necessarily punitive because they specify ACORN by name and are unduly broad. Pet. App. 25a. The court of appeals correctly rejected these contentions.

Petitioners argue that "a law targeting a specific individual or firm * * * is presumptively suspicious" and that Congress "must show some non-punitive reason that would not merely justify the regulation of a class of individuals but explain why the affected entity is in a unique situation that demands special treatment irrespective of whether it is guilty of misconduct." Pet. 20; see also Pet. 16 (faulting the court of appeals for "never question[ing] whether the government had articulated a non-punitive reason to distinguish between ACORN

and the many other federal contractors who are accused of, admit to, or convicted of misconduct.").

These argument echo contentions advanced in *Nixon*, where the former President argued that "the Constitution is offended whenever a law imposes undesired consequences on an individual or on a class that is not defined at a proper level of generality." 433 U.S. at 469-470. Former President Nixon urged that the statute impermissibly "singl[ed]" him out, "as opposed to all other Presidents or members of the Government, for disfavored treatment." *Id.* at 470.

Rejecting these assertions, the Court explained that this "view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality." *Nixon*, 433 U.S. at 470; see also *BellSouth Corp.* v. *FCC*, 162 F.3d 678, 684 (D.C. Cir. 1998) (noting that this "Court's jurisprudence on this point is hardly surprising, because '[l]egislative measures often grant or withhold benefits or burdens from precisely identified individuals or groups'") (quoting Laurence H. Tribe, *American Constitutional Law* § 10-5, 650-651 (2d ed. 1988)) (brackets in original); *SeaRiver Mar. Fin. Holdings, Inc.* v. *Mineta*, 309 F.3d 662, 674 (9th Cir. 2002) ("[E]ven if [an] Act singles out an individual on the basis of irreversible past conduct, if it furthers a nonpunitive legislative purpose, it is not a bill of attainder.").

The court of appeals considered petitioners' contention that Congress might have chosen narrower means to achieve its end, but concluded that the form of the legislation did not suggest punitive intent. Pet. App. 26a-29a. Cf. *Nixon*, 433 U.S. at 482 ("[I]t is often useful

to inquire into the existence of less burdensome alternatives by which th[e] legislature (here Congress) could have achieved its legitimate nonpunitive objectives," when determining whether a law constitutes punishment prohibited by the Bill of Attainder Clause). The Second Circuit concluded that "it was entirely reasonable for Congress to broadly exclude ACORN's affiliates, subsidiaries, and allies from federal funds," noting that ACORN's own reports demonstrated that its organization and related entities "make up * * * an amorphous and sprawling family of organizations." Pet. App. 26a. In light of the complex structure of the "ACORN Family," and the fact that money is fungible, *e.g.*, *Sabri* v. *United States*, 541 U.S. 600, 606 (2004), Congress could reasonably determine that any federal money flowing to ACORN or related organizations was at risk of being misused or wasted, and that limited federal money would be better spent elsewhere.

In a similar vein, petitioners argue (Pet. 26) that the legislation was necessarily punitive because Congress could have allowed the Executive Branch to restore ACORN funding as soon as it determined "that certain conditions have been met." But Congress, not the Executive Branch, is responsible in the first instance for appropriating federal funds. That authority is, of course, cabined by various constitutional constraints and cannot be used to inflict punishment. The Constitution does not, however, bar Congress from legislating with specificity to safeguard the use of taxpayer money in contracts and grants, and does not authorize a court to set aside legislation on the ground that Congress might

have chosen to rely on the Executive Branch's slower and less certain administrative procedures.[7]

c. This Court has made clear that "[j]udicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed." *Flemming*, 363 U.S. at 617. The Court has thus cautioned that "only the clearest proof could suffice to establish the unconstitutionality of a statute" on the basis of impermissible congressional motive. *Ibid.* A legislative record cannot support a conclusion that a law is motivated by a desire to "punish" affected persons unless it presents "*unmistakable* evidence of punitive intent." *Selective Service*, 468 U.S. at 856 n.15 (emphasis added) (quoting *Flemming*, 363 U.S. at 619). Thus, in *Selective Service*, the Court declined to find that the challenged statute was punitive even though opponents of the measure considered it punitive and there were "several isolated statements" among the statute's supporters "ex-

---

[7] Petitioners also contend (Pet. 25) that the funding restrictions were necessarily punitive because they were not made contingent on the results of the GAO investigation that the legislation also required, see p. 6, *supra*. The court of appeals properly determined that Congress could "modify the appropriations law following the GAO's investigation," and that a temporary ban on receiving government funds, coupled with the GAO investigation, was proportionate to Congress's legitimate, non-punitive purpose. Pet. App. 28a-29a. Indeed, GAO's investigation is not yet complete. GAO issued a preliminary report on June 14, 2010, stating that its "analysis related to these objectives is ongoing, [and] the information in this report is preliminary and subject to change." See GAO, *GAO-10-643R, Preliminary Observations on Funding, Oversight, and Investigations and Prosecutions of ACORN or Potentially Related Organizations* 2 (2010). GAO noted that it plans to issue a further, final report.

pressing understandable indignation over the decision of some nonregistrants to show their defiance of the [draft] law." *Ibid.*

The Second Circuit properly followed this precedent in holding that "there is not 'unmistakable evidence' of congressional intent to punish" petitioners, such that the temporary appropriations restriction is an unconstitutional bill of attainder. Pet. App. 23a. The court noted that in *Lovett*, "the congressional record was 'unmistakably' clear as to Congress's intent to punish the subject individuals," while here, "at most, there is the 'smattering' of legislators' opinions regarding ACORN's guilt of fraud." *Id.* at 31a.

3. Petitioners assert two purported inter-circuit conflicts, both of which are illusory. First, petitioners contend (Pet. 14-17) that the court of appeals created a conflict with the D.C. Circuit by not treating the funding restriction as "suspect" because of its specificity. The D.C. Circuit has endorsed no such principle.

In *Foretich* v. *United States*, 351 F.3d 1198 (2003), the D.C. Circuit held that Congress had overstepped constitutional bounds in resolving a custody dispute in favor of a child's mother on the "basis of a judgment that [the father had] committed criminal acts of child sexual abuse." *Id.* at 1204. The court noted that Congress had passed the statute after the D.C. Superior Court had dismissed the allegations of sexual abuse; from all the evidence, the court concluded that "[t]he Act memorializes a judgment by the United States Congress that Dr. Foretich is guilty of horrific crimes * * * despite the repeated and unwavering rejection of such claims by every court that considered them." *Id.* at 1223.

The D.C. Circuit stressed that its holding reflected the punitive nature of the statute, not its specificity.

Noting that "'virtually all legislation operates by identifying the characteristics of the class to be benefited or burdened,'" the court observed that "it is not clear that the specificity requirement retains any real bite." 351 F.3d at 1218 (quoting *BellSouth Corp.*, 144 F.3d at 63). Rather, specificity "is only the beginning of [the] inquiry" under the Bill of Attainder Clause, and under that inquiry, "the principal touchstone of a bill of attainder is punishment." *Ibid.* Thus, *Foretich* does nothing to establish a conflict concerning the validity of precisely focused legislation.[5]

Second, petitioners contend (Pet. 24-28) that the court of appeals' decision conflicts with other decisions that have examined whether equally effective but "less burdensome alternatives" existed. *Nixon*, 433 U.S. at 482; see *SeaRiver*, 309 F.3d at 677; *Foretich*, 351 F.3d at 1222. This Court has already established that such an inquiry "is often useful" in answering the question "whether a legislature sought to inflict punishment on an individual," *Nixon*, 433 U.S. at 482, but it has never suggested that legislation is subject to a least-restrictive-means test merely because the regulated party finds it burdensome. A law is not a bill of attainder if it is not punitive, and here (as in *Nixon* and *SeaRiver*) the law is not punitive. Moreover, the court of appeals' analysis explains why petitioners' proffered less burdensome alternatives would not in fact be equally effective: in particular, ACORN's complex structure gave Congress a valid reason to include ACORN's subsidiaries and affiliates in the restriction

---

[5] In any event, narrow focus is more easily justified in the appropriations context, as in this case: Congress often operates with great specificity when prescribing how appropriated funds are to be spent, and that specificity does not by itself reveal any punitive intent.

alongside ACORN itself. Pet. App. 26a. Because the means Congress chose were proportionate to its legitimate ends, *id.* at 23a-29a, no further means-ends scrutiny was necessary.

4. This Court has not addressed whether the Bill of Attainder Clause applies to corporations. Cf. *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 779 n.14 (1978) ("Certain 'purely personal' guarantees * * * are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee has been limited to the protection of individuals.") (quoting *United States* v. *White*, 322 U.S. 694, 698-701 (1944)). Petitioners (which are corporations) therefore are mistaken in their assertion that the *way* in which the court of appeals has applied the Clause to corporations conflicts with this Court's precedent.

The court of appeals *agreed* with petitioners that the Bill of Attainder Clause protects corporations. See Pet. App. 18a (citing *Con Ed*, 292 F.3d at 349). Petitioners nevertheless ask the Court to consider whether the Clause would apply to corporations in precisely the same manner as to individuals in this suit. Answering that question would require this Court to examine whether the Clause applies to corporations at all.[9] And neither that larger question nor the secondary question that petitioners present independently warrants review: the courts of appeals generally agree that to the extent the Clause protects corporations, "[t]here may well be actions that would be considered punitive if taken against an individual, but not if taken against a corporation." *Id.* at 20a (quoting *Con Ed*, 292 F.3d at 354); accord

[9] There is a substantial historical argument that it would not. See, *e.g.*, 1 William Blackstone, *Commentaries* *464 (an aggregate corporation "is not liable * * * to attainder").

BellSouth Corp., 162 F.3d at 683-684 ("[I]t is obvious that there are differences between a corporation and an individual under the law," and therefore "any analogy between prior cases that have involved individuals and this case, which involves a corporation, must necessarily take into account this difference.").

In any event, there is no indication here that the Second Circuit would have applied a different analysis if petitioners were individuals with a history of mismanagement who applied for discretionary federal grants and contracts. Rather, the outcome of this case turned on the legitimate purpose of the funding restriction.[10]

5. Even if the question presented might warrant review in an appropriate case, this is not such a case, because in the posture of this case the resolution of that question may well not matter, for several reasons.

a. As an initial matter, the petition is interlocutory. Petitioners brought suit on three theories, but only one was the basis for the decisions below. The court of appeals' decision returned the case to the district court for further proceedings on petitioners' First Amendment and due process claims, Pet. App. 32a, which if success-

---

[10] Petitioners' reliance (Pet. 29) on this Court's jurisprudence regarding corporations' First Amendment rights is inapposite. A corporation's protection against being debarred from government business for refusing to support a political party or its candidates, see *O'Hare Truck Serv., Inc.* v. *City of Northlake*, 518 U.S. 712 (1996), or to engage in political speech, see *Citizens United* v. *FEC*, 130 S. Ct. 876 (2010), is unrelated to Congress's authority to temporarily halt discretionary federal funds to an organization with a history of mismanagement. Petitioners have asserted no right to receive federal money, and their analogy to the lifetime employment bar held invalid by this Court in *Lovett* makes no attempt to grapple with the distinctions inherent in the application of the Bill of Attainder Clause to a corporation rather than to an individual.

ful would presumably yield the same result that petitioners seek here. The district court has stayed those proceedings pending disposition of the petition for a writ of certiorari. See p. 10, *supra*.

b. Indeed, while petitioners are litigating those claims on remand, there is a significant possibility that the case will become moot. Petitioners seek prospective relief against legislation that is currently set to expire a few months from now, on September 30, 2011. See p. 7, *supra*; see also 2d Am. Compl. 37-39 (seeking only prospective relief, costs, and attorney's fees). Although it is possible that Congress might extend current law into the next fiscal year or adopt another funding restriction applicable to petitioners in some form, the adoption of *new* legislation—which would come with a new legislative record, potentially including information developed in the ongoing GAO investigation, and which might have a different scope—would not be sufficient to keep alive petitioners' arguments against the current legislation. Because petitioners seek interlocutory review in a case challenging a statute that may no longer be in force by the time this Court convenes for its next Term, plenary review is not appropriate at this time.[11]

c. Petitioners' own ability to press a justiciable controversy is also uncertain. Two of the three petitioners, ACORN and Acorn Institute, have filed for relief under Chapter 7 ("Liquidation") of the Bankruptcy Code, 11 U.S.C. 701 *et seq.* See *In re Acorn Inst., Inc.*, No. 10-50362 (Bankr. E.D.N.Y. filed Nov. 2, 2010); *In re Association of Cmty. Orgs. for Reform Now*, No. 10-50380

[11] If the case remains justiciable, petitioners would be able to seek this Court's review after final judgment, even on questions finally decided at this interlocutory stage. See, *e.g.*, *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 (2001) (per curiam).

(Bankr. E.D.N.Y. filed Nov. 2, 2010). Because petitioners derived only a small fraction of their funding from federal grants and contracts, see p. 9, *supra*, it is highly questionable whether even the relief petitioners seek would provide a sufficient infusion of funding to cause them to change their plans to liquidate. And the fact that petitioners are now insolvent might well be an independent reason not to award them new grant monies or contracts.

The third petitioner, New York Acorn, has reorganized and is now known as MHANY Management, Inc. After MHANY's reorganization, HUD concluded that MHANY was no longer an "affiliate, subsidiary, or allied organization of ACORN." See note 6, *supra*. The allegations in the complaint pertaining to MHANY focused on housing related funds. See 2d Am. Compl. ¶ 23. MHANY's continued stake in challenging the funding restriction, therefore, is questionable at best.

Because this case involves a challenge to a statute set to expire and was brought by plaintiffs that may no longer have a concrete stake in the challenge, the most appropriate course at this point is to allow proceedings in the district court to resume.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
MARK R. STERN
HELEN L. GILBERT
Attorneys

MAY 2011

(2)

Supreme Court U.S.
FILED
MAY 27 2011
OFFICE OF THE CLERK

No. 10-1068

IN THE

Supreme Court of the United States

ACORN, ACORN INSTITUTE, INC., and MHANY MANAGEMENT, INC., f/k/a/ New York Acorn Housing Company, Inc.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

DARIUS CHARNEY
CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6464

JULES LOBEL
Counsel of Record
3900 Forbes Avenue
Pittsburgh, PA 15260
(412) 334-1379
jll4@pitt.edu

Counsel for Petitioners

[illegible]

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

CONCLUSION 11

TABLE OF CITED AUTHORITIES

Page

CASES

BellSouth Corp. v. FCC,
144 F.3d 58 (D.C. Cir. 1998) 3

BellSouth Corp. v. FCC,
162 F.3d 678 (D.C. Cir. 1998) 1, 3

Foretich v. Morgan,
351 F. 3d 1198 (D.C. Cir. 2003) 1, 3, 9

Nixon v. Adm'r of General Servs.,
433 U.S. 425 (U.S. 1977) 1, 3, 6

SBC Comm'n. v. FCC,
154 F.3d 226 (5th Cir. 1998) 1

United States v. Brown,
381 U.S. 437 (U.S. 1965) 1, 4

United States v. Lovett,
328 U.S. 303 (U.S. 1946) 1, 4, 5

UNITED STATES CONSTITUTION

U.S. Const. Article I, Section 9, cl 3
(Bill of Attainder Clause) ..... *passim*

U.S. Const. First Amendment 10, 11

Page

OTHER AUTHORITIES

American Bar Association, *Resolution 116*, Report To The House Of Delegates (2010), *available at* http://www2.americanbar.org/SiteCollectionDocuments/_116.pdf 2-3

Office of Management and Budget, Executive Office of the President of the United States, *Proposed Budget of the United States, Fiscal Year 2012* (2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/appendix.pdf..... 5

Second Circuit Holds That Law Barring ACORN From Receiving Federal Funds is Not a Bill of Attainder, 124 HARV. L. REV. 859 (2011) 1-2

1. The Government acknowledges that Congress debarred ACORN and its affiliates from federal contracting and funding because it believed ACORN guilty of mismanagement. The Government supports the court of appeals reasoning that Congress had a legitimate reason to bar funding "in the face of clear evidence of mismanagement" by ACORN. Respondents' Brief in Opposition ["Resp. Br."]. at 13. Yet a touchstone of whether a statute targeting an individual person or organization is a Bill of Attainder is whether Congress has acted based on an implicit or explicit finding of guilt, for, in so acting, Congress oversteps its legitimate legislative role and intrudes on the judicial or administrative function of determining individual guilt.

Where Congress singles out an individual or group for a deprivation based on a determination that it is guilty of misconduct, the judiciary has *always* declared the statute unconstitutional bill of attainder. *United States v. Lovett*, 328 U.S. 303 (1946); *United States v. Brown*, 381 U.S. 437 (1965); *Foretich v. Morgan*, 531 F. 3d. 1198 (D.C. Cir. 2003). In contrast, *only* where a court finds that a statute singling out an individual renders no implied or explicit judgment on the entity's guilt or misconduct has that statute been held not to constitute a Bill of Attainder, despite its selectivity. *Nixon v. Adm'r of General Servs.*, 433 U.S. 425, 472, 475-84 (1977); *BellSouth Corp. v. FCC*, 162 F. 3d 678, 690 (D.C. Cir. 1998); *SBC Commc'n v. FCC*, 154 F. 3d 226,243 (5th Cir. 1998). The court of appeals holding in this case is therefore *unprecedented* and contradicts this Court and Circuit decisions by allowing Congress to single out a specific group for a serious deprivation because Congress believed that group guilty of significant mismanagement or some other misconduct. *See Second Circuit Holds That*

Law Barring ACORN From Receiving Federal Funding is Not A Bill of Attainder, 124 HARV. L REV. 859, 863(2011) ("In holding that the denial of funds was not punitive in this case, the Second Circuit relied on Congress's implicit conclusion that ACORN had committed the acts of fraud and mismanagement of which it was accused, a judgment Congress is not entitled to make.").

The government argues, as did the court of appeals, that Congress could reasonably base its actions here on "clear evidence of mismanagement." Resp. Br. at 13. ACORN, by contrast, while acknowledging that it made some mistakes and that individual employees committed misconduct and were fired, claims that it has been the object of a partisan attack and strongly disputes the allegations of mismanagement and crimes that numerous members of Congress alleged they were guilty of. *See* Pet. App. 35a, 36a. As the District Court noted, the question here is not whether Congress' view of the evidence, or petitioners' response is correct. *Id.* at 35a Rather, the issue is whether Congress is the branch of government empowered to decide whether a specific organization is guilty of mismanagement or other crimes and impose a serious deprivation on that organization. The Bill of Attainder Clause stands for the proposition that it is not.

If Congress can debar ACORN, it can debar other corporations which it believes have been negligent, guilty of mismanagement, misused government funds, or other crimes. The serious problems such congressional statutes present led the American Bar Association to oppose legislation of this type. *See* American Bar Association, *Resolution 116*, REPORT TO THE HOUSE OF DELEGATES (2010), *available at* http://www2.

americanbar.org/SiteCollectionDocuments/116.pdf; Pet. at 4. If the Second Circuit's reasoning is correct, Congress could also decide that there is "clear evidence" that a particular executive or judicial administrative employee has committed misconduct and suspend or fire the employee using its appropriation power. In our system of government, those tasks historically have been assigned to administrative agencies or the judiciary. This Court should not permit Congress to start performing judicial, administrative or executive functions that it has never performed before.

2. The government argues against a straw man, responding to an argument that petitioners have not made – namely that the Constitution prohibits Congress from legislating against a specific individual or group. Resp. Br. at 13-14. Petitioners – and the District Court – recognize that Congress *can* legislate by singling out a specific individual or group for some deprivation, but only where it can show a non-punitive reason to *single out* that group for differing treatment that does not reflect a judgment of guilt. This Court in *Nixon* relied on just such a non-punitive rationale to find no Bill of Attainder violation, as did the circuit courts in the *Bell Operating Companies* cases. Pet. at 18-19. In *Foretich*, the D.C. Circuit held that the government had not articulated a non-punitive rationale explaining the differential treatment given one individual, and thus declared the statute at issue unconstitutional. Pet. at 16.[1]

1. The government correctly notes that the *Foretich* court rejected the notion that specificity alone is sufficient to render a statute a Bill of Attainder, and that the principal touchstone of a bill of attainder is punishment, but it fails to acknowledge that in *Foretich*, the court clearly held that the specificity of a statute was

The government's test essentially nullifies the Bill of Attainder Clause and contradicts *Lovett* and *Brown*. For so long as Congress is not acting irrationally – some evidence exists that a particular individual or organization is doing something wrong – the court of appeals rationale would permit Congress to take measures pursuant to its appropriation powers (or other enumerated powers) to ensure that the person or group not be in a position to continue the wrongdoing. Under the government's rationale, Congress should be able to prohibit specific individuals or organizations from holding union positions if it has "clear" evidence that person has provoked illegal political strikes, deprive a father of child custody so long as it reasonably believes that the father is a child abuser, or deprive a government employee of a government job (or as in *Lovett*, funding for a government position) if it has reason to believe that the government employee is subversive, a traitor or has committed fraud. However, such statutes would be inconsistent with this Court's Bill of Attainder jurisprudence.

3. The government repeats the court of appeals' error in arguing that petitioners "are not prohibited from any activities; they are only prohibited from receiving federal funds to continue their activities." Resp. Br. at 12. Petitioners' contracts were terminated – thus they could not "continue their activities". Contractors who repair government buildings or federal highways cannot "continue their activities" once their contracts are terminated and they are barred from new contracts.

---

relevant to the punishment inquiry, and required the government to articulate a non-punitive rationale which would explain the singling out of an individual, which in that case – as here – the government was unable to provide. Pet. at 16.

Government employees such as Lovett cannot continue their activities if forbidden from receiving any appropriations for government work, and groups such as petitioners that work on government financed mortgage counseling or other government programs cannot "continue their activities" once their contracts are terminated and they are barred from bidding on new contracts.

It is true that petitioners can continue to seek other, non-governmental funding (although in this case the statutes at issue made even that very difficult, *see* Pet. App. at 68a-69a), just as Lovett could have sought a non-governmental job. But the argument that a statute is not a Bill of Attainder because it only denies petitioners appropriations and doesn't banish them from a profession was explicitly rejected in *Lovett*. The *Lovett* Court stated that, "we do not agree with counsel for Congress that the section did not provide for the dismissal of respondents, but merely forbade government agencies to compensate them for their work... This permanent proscription from the opportunity to serve the government is punishment, and of a most severe type." *United States v. Lovett*, 328 U.S. 303, 313,316 (1946). Here, petitioners have also been proscribed "from the opportunity to serve the government" through government contracts or awards. The bar is effectively permanent, in that it has been renewed continuously over the past few years, appears likely to be continued by Congress again and is already included in the government's proposed budget for FY 2012,[2] and, as the

2. Office of Management and Budget, Executive Office of the President of the United States, *Proposed Budget of the United States, Fiscal Year 2012* 221,315,701,967,1064 (2011), available at http://www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/appendix.pdf.

District Court noted, an annually renewed Congressional ban that could not be challenged until made permanent would permit Congress to effectively permanently ban a disfavored corporation. Pet. App. 55a. Moreover, even if the ban were only to last two years, such a bar is generally recognized to have "harsh" consequences and is a "very serious matter" for government contractors. *See* Pet. at 30 (citing cases).

4. The government argues that even if these statutes are overbroad and "less burdensome alternatives" existed, "a law is not a bill of attainder if it is not punitive and here... the law is not punitive." Resp. Br. at 18. This argument is circular, because the point of looking at whether the statute is clearly overbroad is because such overbreadth serves as evidence that punishment is afoot. *Nixon*, 433 U.S. at 482. Just as punishment was historically imposed on vanquished opponents by not only banishing or beheading them, but also by imposing deprivations on their allies or relatives, *see* Pet. at 21-22 n. 27, so too an objective indicator of punishment today is whether the statute is far broader than necessary to serve the non-punitive rationale that Congress asserts.

The government claims, as did the court of appeals, that it is not overbroad and punitive to debar a corporation such as petitioner MHANY for which, indisputably, no evidence of misconduct or mismanagement exists, because of the "*complex structure* of the "ACORN Family" and the fact that money is fungible." Resp. Brief at 15, 18-19 ("ACORN's *complex structure* gave Congress a valid reason to include ACORN's subsidiaries and affiliates in the restriction...")(emphasis added). But the government does not explain why the "complex structure" of "the formally separate entities that together constitute

the ACORN Family," *id.* at 2, justifies disregarding petitioners separate corporate identity here. Typically, the corporate form is respected absent evidence that the corporate form is being misused, or that money is being diverted from one company to another, or that the related corporation has participated in the target corporation's misconduct, or that all are part of a criminal scheme, as Congress concluded in the terrorism or racketeering "family" context.. The only plausible explanation for the "allied" organizations debarment that ensnared petitioners MHANY and ACORN INSTITUTE ("AI") was provided by the Congressional "Issa" report that inspired these statutes and was relied on by their Senate sponsor,– namely that these separately incorporated corporations were part of a shell game and a criminal enterprise designed to defraud the government. That rationale, however, is clearly punitive, and therefore the government does not rely on it – but instead uses the term "complex structure," which it does not define or explain, but which must be a code term for "complex and illegitimate structure" in order to justify this statute.

5. The government claims that Congress had a legitimate reason to decide that ACORN and all its affiliates must be immediately defunded, rather than "rely on the Executive Branch's slower and less certain administrative procedures." Resp. Br. at 16. The government's suggestion that Congress is the swift moving body and that Executive branch procedures are "slower" is certainly unusual. In any event, the administrative process for suspending and debarring federal contractors is designed to respond quickly to allegations of serious misconduct, and Congress has not thus far believed that the administrative process needs to be amended to speed it up to address allegations of fraud or mismanagement, nor is legislation currently

pending to address the government's newly discovered concern for the slowness of the process.

The administrative procedures are "less certain," in that they accord the affected corporations some modicum of due process before suspension and debarment. However, as this Court has noted, the Bill of Attainder Clause was designed to prevent Congress from becoming a "lynch mob," rushing to judgment based on inflamed popular sentiment, and thus it is precisely legislative circumvention of the "less certain" due process procedures utilized by the judiciary or modern day administrative agencies that the Bill of Attainder Clause protects against.

6. The government notes that ACORN only obtained 10% of its funding from government sources, and therefore the statutes did not threaten ACORN's very existence. Resp. Br. at 9. Aside from the fact that petitioner AI received a far greater percentage of its funding from the government, the court of appeals and the government ignore the district court's undisputed factual finding that the funding ban - which applies not only to ACORN but any undefined allied group - "has also affected ACORN's ability to obtain funding from non-governmental entities fearful of being tainted – because of the legislation – as an affiliate of ACORN." Pet. App. 68a-69a

7. The government also claims that review is unwarranted here because "in the posture of this case," resolution of the Bill of Attainder question "may well not matter." Resp. Br. at 20 However, the government does not argue that petitioners' claims are now moot, but, rather, that they might become moot in the future for several reasons, none of which is convincing.

First, the government argues that Congress might not re-enact the ACORN defunding ban for FY 2012, even though Congress has extended the ban numerous times already in both continuing appropriations resolutions and annual appropriation acts, has done so the last few times without opposition, and the ban is included in the President's proposed budget for FY 2012.[3] Yet, even if Congress does not re-extend the ban for next year, or extends it in some slightly different form, petitioners' claims would not be moot for several reasons.

Accepting the government's argument would mean that ACORN could never obtain review of an indefinite, year to year appropriations ban, because the government could always make the same argument it makes now - that the ban might shortly expire and therefore review is unwarranted. As the District Court noted, this situation presents the "capable of repetition but evading review" problem that this Court has held is an exception to the mootness doctrine. Pet. App. 55a. Moreover, petitioner MHANY has a live current controversy even if Congress determines not to extend the ban. The Congressional ban has significantly damaged MHANY's reputation and has caused several major New York banks with whom it had important relationships prior to the ban's enactment to avoid the organization, which has in turn deprived MHANY of funding needed to run many of its service programs and financing for some of its affordable housing developments. That reputational injury, with its important economic component, continues even if petitioners were no longer precluded from receiving federal contracts. Pet. App. 67a-69a, 71a fn. 12; *Foretich*, *supra*, at 1216.

---

3. *See* fn 2, *supra*.

Second, the government asserts that since two of the petitioners have now filed for bankruptcy, and MHANY was declared by HUD not to be an allied organization of ACORN after the oral argument in the Second Circuit (during which counsel for the government was pressed by the court to state its position on whether MHANY was an allied organization), their claims may be moot irrespective of whether Congress reenacts the ban. However, the Trustee and Bankruptcy Court have authorized petitioners' counsel to seek relief in this Court, and, as stated above, MHANY continues to suffer real and ongoing reputational and economic injuries as a result of the funding ban, notwithstanding HUD's decision. In addition, HUD's voluntary change of position during the course of this litigation does not moot MHANY's claims, so long as the statutory bar continues. *See* Pet. at 2 fn 1.

Finally, the government suggests that the Court wait to see what happens on remand, because the petitioners might succeed on one of their other constitutional claims. But if the lower courts declared these statutes unconstitutional for either First Amendment or Due Process reasons, the government would undoubtedly seek and obtain review in this Court. Then the Court would be faced not only with the important and potentially dispositive Bill of Attainder question that the case presents at this posture, but also complex Due Process and First Amendment issues which at this point need not be resolved.

This case presents important Bill of Attainder issues in which the Second Circuit opinion is at odds with a decision of the D.C. Circuit. The case affords this Court the opportunity to clarify the law in an important, albeit

seldomly-litigated area. The best time for this Court to decide these issues is now, not some indefinite time in the future. The facts here are not in dispute, the case was decided on cross motions for summary judgment, and therefore there is no reason to wait for a more developed record. Judicial economy will be furthered if this Court now decides the potentially dispositive Bill of Attainder issue, as opposed to requiring the lower courts, and ultimately possibly this Court to grapple with complex, and potentially fact-dependent, First Amendment and Due Process questions which may well be unnecessary to resolve.

CONCLUSION

For all of the above reasons, petitioners urge this Court to grant review in this case.

Dated: New York, New York
May 27, 2011

Respectfully Submitted,

DARIUS CHARNEY
CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6464

JULES LOBEL
Counsel of Record
3900 Forbes Avenue
Pittsburgh, PA 15260
(412) 334-1379
jll4@pitt.edu

Counsel for Petitioners